92-1300

SUPREME COURT, U.S.
DEC 10 1992
OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROY J. KENDALL, et al,

Petitioners,

v.

THE CITY OF VISALIA, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

LEONARD C. HOAR, JR.
Attorney at Law
3948 E. Gettysburg
Fresno, CA 97326
Telephone: (209) 222-3521

212 pp

STATEMENT OF QUESTIONS PRESENTED

1. Do plaintiff and his attorney have the right under the First Amendment to petition the government of the City of Visalia for redress of grievances through the filing and prosecution of a lawsuit in order (a) to save Visalia Taxpayers' money, (b) to halt the illegal use and waste of taxpayers' general fund money and property to finance and support the construction of the privately owned Visalia Radisson Hotel, and (3) to recover misspent funds for the City Treasury?

2. Does a plaintiff who petitions the government for redress of grievances through the filing and prosecution of a lawsuit under the First Amendment have the right to have an attorney represent him in that lawsuit?

3. Does the attorney who represents a plaintiff client in exercising the First

Amendment right to petition the government for the redress of grievances through the filing and prosecution of a lawsuit have the right to do so without punishment or the threat of punishment through arbitrary and capricious imposition of sanctions for having done so, which sanctions in turn have a chilling effect upon any other attorneys representing similar such clients in similar situations.

4. Does the First Amendment right to petition the government for redress of grievances through the filing and prosecution of a lawsuit include protection against arbitrary and capricious dismissal of the action by a state court's deciding the case on methodology and not merit the first time the court rules on a demurrer to the complaint presented by counsel?

LIST OF PARTIES

I. THE FOLLOWING INDIVIDUALS ARE PARTIES TO THE APPEAL FROM WHICH THIS PETITION FOR WRIT OF CERTIORARI EMANATES:

a. Roy J. Kendall, Plaintiff and Appellant and Petitioner.

b. Leonard C. Hoar, Jr., Plaintiff's Attorney, Appellant, and Petitioner.

c. The City of Visalia, Defendant and Respondent.

d. The Redevelopment Agency of the City of Visalia, Defendant and Respondent.

e. Gregory F. Collins, Defendant and Respondent. (Mayor)

f. Alan T. McIntosh, Defendant and Respondent. (Councilman and Contractor)

g. Mary Louise Vivier, Defendant and Respondent (Councilwoman)

h. Bob McClain, Defendant and Respondent (Councilman)

i. Don Sharp, Defendant and Respondent (Councilman)

j. Berkley Johnson, Defendant and Respondent (Councilman)

k. Tim Hansen, Defendant and Respondent (Finance Director, City of Visalia)

m. The Visalia Building Authority, Defendant and Respondent.

n. Jeffrey M. Oderman, Defendant and Respondent (Special Counsel to the City of Visalia)

o. Ski Harrison, Defendant and Respondent (Special Counsel to the City of Visalia)

p. Rutan and Tucker, Defendant and Respondent (Special Counsel to the City of Visalia)

2. OTHER DEFENDANTS WHO ARE NOT INVOLVED IN THIS PETITION OR THE DECISIONS BELOW ARE AS FOLLOWS:

a. Donald R. Duckworth, City Manager.

b. McCormick, Kabot, Michner & Foley, A Partnership of Law Corporations, and Steve L. Kabot, City Attorney for the City of Visalia.

c. Metro North State Bank, A Missouri State Banking Corporation.

d. Frank Morgan (with Metro)

e. David B. Feingold (with Metro)

f. Lincoln & Osterman (real estate brokers)

g. Terry Lincoln (broker)

h. Bill Osterman (broker)

i. Pannell, Kerr, Forster, now Madison Associates (CPA)

j. American Air Company, Inc. (Alan McIntosh's corporation)

k. Energy Alliance Corporation (Alan McIntosh's corporation)

l. Sequoia Plumbing, Inc. (Alan McIntosh's corporation)

m. William E. Courtney (hotel developer).

n. Visalia Convention Center Hotel, Inc. (Courtney)

o. The Courtney Group, Inc. (Courtney)

p. Surgery Center, Inc. (Courtney)

q. Professional Center at Sunvalley, Inc. (Courtney)

r. Pacific Development, Inc. (Courtney)

s. The Berkeley Center, Inc. (Courtney)

t. Pacific Development Group, Inc. (Courtney, a Washington corporation)

u. Diana Dooley (public relations).

v. Security Pacific National Bank.

w. First American Title Insurance Company.

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1. OFFICIAL AND UNOFFICIAL REPORT OF OPINIONS

The official and unofficial reports of opinions and decisions below are set forth in the Appendix submitted herewith. The include the following:

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2. **GROUNDS ON WHICH JURISDICTION IS SOUGHT**

a. Denial by Hearing was filed by the California Supreme Court on August 12, 1992.

b. Petitioners Applied for an Extension of Time in which to file the Petition for Writ of Certiorari.

c. The Honorable Justice Sandra Day O'Connor signed on order on November 2, 1992, extending the time to and including December 10, 1992.

d. Jurisdiction is conferred upon this Court under 28 U.S.C. Section 1257(3). Petitioners claim violation of

the First Amendment right to petition the government for redress of grievances through the filing and prosecution of a lawsuit.

3. **CONSTITUTIONAL PROVISION INVOLVED**

a. **FIRST AMENDMENT**

Congress shall make no law respecting . . . the right to the people . . . to petition the government for a redress of grievances."

b. **FOURTEENTH AMENDMENT**

" . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. **CONCISE STATEMENT OF THE CASE.**

(NOTE: References to CT are to the Clerk's Transcript; App refers to documents in the Appendix filed herewith.)

a. **Procedural Facts.**

1) Plaintiff, In Pro Per, filed a taxpayer's complaint in the United States District Court, Eastern District of California on July 3, 1989, within 1 year of accrual on July 29, 1988.

2) Federal jurisdiction was found lacking. Plaintiff, In Pro Per, filed his original state court action on September 7, 1989, and then dismissed his federal action.

3) The purpose of the suit is (1) to save Visalia taxpayers' money, (2) to halt the illegal use and waste of taxpayers' general fund money and property to finance and support the construction of

the privately owned Visalia Radisson Hotel, and (3) to recover misspent funds for the City Treasury.

4) On May 30, 1990, plaintiff with counsel filed the Third Amended Complaint, a taxpayer's action, 123 pages, plus appendix, and 10 causes of action.

5) Defendant CITY OFFICIALS demurred and moved to strike portions of the Third Amended Complaint, and requested sanctions. Defendant APPRAISERS demurred. Defendant Pannell Kerr Forster answered. The other defendants are on open extension pending results here.

6) The demurrer and motion to strike were heard before the Honorable Howard R. Broadman, Judge, on August 23, 1990, and resulted in the first ruling on demurrer after Plaintiff retained counsel.

7) As to CITY DEFENDANTS, Judge Howard Broadman sustained the demurrer without leave to amend as to all

causes of action except RICO for which leave was granted, and sanctioned plaintiff's attorney and appellant Leonard C. Hoar, Jr., $7,500 for, among other things, having filed **"a frivolous action in bad faith for the purpose of delay."** Judge Broadman sustained Defendant APPRAISERS' demurrer to the Fifth and Tenth Causes of Action with leave to amend. Judge Broadman ordered City Attorney Steve Kabot to prepare the order. (See App. 51 and 62)

b. **The Third Amended Complaint.** Plaintiff ROY J. KENDALL filed the Third Amended Complaint, a taxpayer's suit against the CITY OF VISALIA, et al, involved the following: (CT 1)

1) Causes of Action. The complaint, comprised of 10 causes of action, is 123 pages long, (CT 1-123)

together with an Appendix (CT 124-139) which sets forth a chronology of events. The 10 causes of action are as follows:

a) Individual Liability of Public Officials for Waste and Illegal Expenditure of Public Funds and Property.

b) Declaratory Relief.

c) Removal of Public Officials from Office.

d) Injunction and Preliminary Injunction.

e) Fraud.

f) Civil Rights Violation.

g) RICO

h) Lender Liability.

i) Accounting.

j) Negligence.

2) A Taxpayer's Action. This is a taxpayer's action under **Code of Civil Procedure** Section 526a on behalf of the CITY OF VISALIA, THE COMMUNITY REDEVELOP-

MENT AGENCY OF THE CITY OF VISALIA, AND THE VISALIA PUBLIC BUILDING AUTHORITY, which public entities have been joined as nominal defendants (CT 3:21-4:17) under **Code of Civil Procedure** Section 382. (Appellants note that the Subject Index and Table of Authorities for the Third Amended Complaint has inadvertently been omitted from the Transcript on Appeal.)

3) Broad, General Facts.

a) The 50-year land lease of City property for the hotel site was entered into on February 1, 1987. It was approved by ordinance as mandated by the Visalia City Charter.

b) The "First Amended Agreement to Lease", at very great variance from the original lease, was approved by motion on July 27, 1988, contrary to the mandate of the Visalia City

Charter, which requires leases of city property of duration longer than 5 years to be approved by ordinance.

c) Appellants objected to the City's $2.9 million payment for Visalia Convention Center Hotel, Inc., as a violation of **California Constitution** Article XVI, Section 6, which prohibits gifts or loans of public monies or pledging of governmental credit. The Courts below cited no exceptions in the Constitution to this prohibition.

d) Appellants objected to the $3.0 million guarantee agreement as pledging the credit of the Redevelopment Agency in violation of **California Constitution** Article XVI, Section 6, which prohibits gifts or loans of public monies or pledging of governmental credit. The Courts below cited no exceptions in the Constitution to this prohibition.

4) Specific Charges of Lack of Due Care. Plaintiff charges Defendant CITY OFFICIALS WITH 28 specific acts of lack of due care. (See paragraph 70 a through ab, CT 45 through 58.)

a) Failure to require payment of prevailing wage to workers as required by Labor Code Section 1720 (a) and (c) and 1775, or, in the alternative, Health and Safety Code Sections 32423 and 32425, thus subjecting the taxpayers to potential liability for penalties.

b) Failure to co-ordinate the simultaneous construction of both the Convention Center Expansion and the Convention Center Hotel, together with the maturity date of the Construction Loan, thus subjecting the project to default and activating the $3,000,000.00 Guarantee Agreement.

c) Failure to require permanent take-out financing at the maturity of the construction loan.

d) Discarding $545,986 architectural plans and having $500,000 in new plans drawn up for the convention center expansion to compensate for the downsizing of the privately owned hotel by transferring cost of facilities to the taxpayers.

e) Failing to have a current feasibility report on the convention center and hotel projects prior to committing taxpayers' money.

f) Paying $4,000,000 for land, then declaring it to be worth $2,000,000 prior to leasing it to the developer for $200,000 per year without obtaining a current appraisal, and without competitive bidding.

g) Making a gift of $2.9 taxpayers' money to a private corporation without lawful authority in violation of **California Constitution** Article XVI, Section 6.

h) Going into business with the developer without

1) Ascertaining his lack of assets;

2) Ascertaining whether he had a checking account;

3) Performing a credit check;

4) Determining he had approximately $1,000,000 in judgments against him.

i) Failing to obtain an adequate, audited financial statement on the developer.

j) Failure to exercise due care in selecting a responsible private developer with whom to work on the

hotel, coupled with defendants' acts promoting the project in secret meetings out of public purview.

k) Signing the Guarantee Agreement which provided unlimited liability by the Agency to the lender.

l) Embarking upon a project in which the scheduled completion date comes 6 months after default on the construction loan.

m) Leaving Blank Spaces on pages 27 and 28 of the First Amended Lease.

n) Permitting the developer to get all his money back at 9% interest before any money is paid to the CITY.

o) Embarking upon a project which, in the event of default of the developer **(which has occurred)** the CITY shall be unable to protect its "investment" unless it pays off the entire

$12,000,000.00 loan, thus making further expenditure of taxpayers' money **(which is now occurring)**.

p) Embarking upon a project in which if the lender forecloses, the accumulated lease payments due from the developer to the CITY are wiped out.

q) Committing the City to make payments in the event the developer defaults, but failing to obtain the City's right to foreclose out the interest of the developer.

r) Changing the plans for the Convention Center expansion, upon which the First Amended Lease was based, without first obtaining consent of the developer, as the original expansion plans were relied upon in the First Amended Lease.

s) The Redevelopment Agency's agreeing to and placing $3,000,000.00 cash guarantee on deposit

with Security Pacific National Bank, Los Angeles, in the event the developer defaults.

t) Subordinating the City's right to receive annual $200,000.00 land lease payments and then conditioning the right to recover lease payments on the net operating income, while leaving determination of costs, expenses and management to the developer.

u) Giving the $3,000,000.00 guarantee agreement with no consideration for the Redevelopment Agency.

v) Using the hotel project as a smokescreen for the use of defendant DIANA DOOLEY, allegedly an employee of the developer, to promote an unpopular governmental project and to promote incumbent politicians.

w) Engaging in conflict of interest whereby members of The City council simultaneously occupy positions on the Redevelopment Agency.

x) Giving the developer the first right of refusal on the sale of the hotel land without submitting the same to competitive bidding.

y) Failure to require the developer to obtain permanent take-out financing before signing the 50-year lease.

z) Paying $2.9 million for developer's equity contribution, which appears to be two years' prepaid interest on the construction loan.

aa) Subjecting the tax-payers to prospective expenditures of $52,000,000.00 for the hotel project without a vote of the people.

ab) The City's Securing a letter of credit to secure the Redevelopment Agency's $5,000,000.00 bond founded upon incremental taxes, thus pledging the credit of the City for the debt of the agency.

5) Additionally, plaintiff set forth further specific charges as follows: (NOTE: CT 59 - 61)

1) Defendant Alan T. McIntosh voted for the Convention Center Hotel Project, resigned, and then acquired and obtained the contract to provide air conditioning for the Visalia Convention Center Hotel through his AMERICAN AIR COMPANY, INC. and SEQUOIA PLUMBING, INC., all in violation of **Government Code** Section 1090.

c. **No Personal Benefit to Plaintiff**. The Third Amended Complaint seeks to right wrongs against the taxpayers, voters and residents of The City of

Visalia and to recover monies for the CITY OF VISALIA. None of the causes of action seek to recover any damages personally for plaintiff. (See prayer for damages, Third Amended Complaint, CT 115-123.) Plaintiff does seek to recover costs and attorney's fees. (CT 123: 18-21)

d. **Hearing of August 23, 1990.** The Demurrers and Motions to Strike were heard before Judge Howard R. Broadman on August 23, 1990. The transcript is set forth at CT 666-726. (A copy of the minute Order is set forth at App. 62; a copy of the written order is set forth at App. 51.)

1) **First Substantive Hearing to Ruling.** This was the **first** hearing resulting in ruling on demurrers and motion to strike after attorney Leonard C. Hoar, Jr., became attorney for plaintiff.

a) Hearing, December 4, 1989. The Demurrer to the First Amended Complaint by Plaintiff, In Pro Per, was heard on December 4, 1989, before Judge John P. Moran, who sustained with 30 days' leave to amend. See the transcript at CT 233-240.

b) Hearing, February 28, 1990. On February 28, the demurrer to the Second Amended Complaint was heard before the Judge John P. Moran. See transcript at CT 497-503). (See App. 64) (The reporter misspelled counsel's name as "Herr," after local Hanford attorney Leonard Herr; however, all references are to plaintiff's counsel Leonard C. Hoar, Jr.) The Court noted (CT 498: 16-499-20) inadequate time to prepare the complaint, counsel's request for an extension of time, and CITY DEFENDANTS' refusal; the

Court granted 60 days to redo the complaint. (Copy of transcript is at App. 64)

a) Court's Advice. Judge Moran then suggested Hoar redo the complaint as completely and effectively as he can (CT 499: 8-11) with ultimate facts. (CT 499: 21-25) Judge Moran encouraged zealous completeness by warning that he was not inclined to grant further leave to amend. (CT 501: 17-21).

b) Defendants' Query on Authorization. City Attorney Steve Kabot questioned whether the Court would permit an attack upon the validity of the guarantee given to METRO NORTH STATE BANK for the $12,000,000.00 hotel loan. (CT 500: 1-13).

c) Court's Specific Authorization To Plead. Judge Moran replied: "He can plead anything he wants, as far as I'm concerned." (CT 500: 14-15)

The Court specifically authorized a challenge to the validity of the lease and the guarantee. (CT 500: 17-501: 22). **(NOTE**: Judge Moran did not issue any prohibitive orders; he granted authorization to act, to plead.)

2) **Dismissal Without Leave To Amend**. The Court dismissed plaintiff's causes (as Hoar's **third** [sic] attempt) for the following reasons:

a) First Cause, The Personal Liability of Public Officials, under CCP Section 526a, declaring it a validating action under CCP 860, et seq. (CT 700: 7-12)

b) Second Cause, Declaratory Relief, declaring it a validating action under CCP 860, et seq. (CT 701: 8 - 14).

c) Third Cause, Removal of Public Officials from office under Visalia City Charter, Article XVI,

"Miscellaneous provisions," Section 13, on grounds of improper methodology. (CT 701: 15-23)

d) Fourth Cause, Injunctive Relief, declaring it a validating action under CCP 860, et seq. (CT 701:24 - 702: 6)

e) Fifth Cause, Fraud, and Tenth Cause, Negligence, on grounds no Claim for Damages (CCP 382 Action, no damages sought for plaintiff) was filed.

f) Ninth Cause of Action, Accounting, declaring it a validating action under CCP 860, et seq. (CT 702: 20-703: 3)

g) Sixth Cause, Civil Rights, on grounds there is no authority for tacking on time from federal action under equitable tolling. (CT 704: 19 - 24) Fifth District upheld, noting omission from the complaint of the allegation

of the original federal lawsuit, and then asserting plaintiff was thus barred from alleging relation back. Opinion, p. 14.

3) **Sanctions**. Finally, the Court sanctioned Hoar $7,500 for the following reasons:

a) Judge Moran told (ordered?) Hoar to organize theories and plead ultimate facts. (CT 717: 20-22). Judge Broadman treated Judge Moran's comments as a direct order, without having seen the hearing transcript. Mr. Kabot later provided a transcript **after** the Court's comments, and the Court made it the Court's Exhibit (CT 719: 12-26), which is appended to the August 23, 1990, minute order. (CT 496 - 503)

b) Judge Broadman objected to the brief introduction to the Third Amended Complaint. (CT 718: 1-719:4)

c) Judge Broadman objected to the chronology of events. (CT 719: 5-16).

d) Judge Broadman objected to the fact that plaintiff had obtained from Judge Moran an extension of time in which to file the Third Amended Complaint. (CT 720: 1 - 15)

e) Judge Broadman objected to Hoar's Declaration for Application for Leave to File Late Papers on Response to Jeffery M. Oderman, et al. (CT 462 - 467) (CT 720:16 - 721), which application he cited as **frivolous, in bad faith, for the purpose of delay**. (CT 721: 21 - 722: 1)

f) Judge Broadman objected to Hoar's citation of **Nichols v. Canoga Industries** (1978) 83 Cal App3d 956, 148 Cal Rptr 459 ; **Bollinger v. National Fire Insurance Company** (1944) 25 Cal2d 399, 409-410, 154 P2d 399; and **Elkins v.**

Derby (1974) 12 Cal3d 410, 115 Cal Rptr 641, 525 P2d 81. (See generally Witkin, 3 **California Procedure 3d**, "Actions," Section 508, et seq.) Judge Broadman, after allegedly having read these three cases, declared in open Court that Hoar had miscited them and that they did not stand for the proposition of equitable tolling of the statute of limitations for a case filed in the wrong forum, including federal Court. (CT 722: 2 - 20) (Cf. CT 707:1 - 709:2; see discussion above at P. 16: 10 - 18: 3.)

g) The Court found Hoar's actions **frivolous, in bad faith, for the purpose of delay**. (CT 721: 24-26)

h) The Court then inquired as to whether Mr. Park for Defendant APPRAISERS had requested sanctions, and Mr. Park indicated they did not. (CT 722: 21-25.)

i) Judge Howard Broadman then imposed $7,500 sanctions upon plaintiff's counsel appellant LEONARD C. HOAR, JR., to go to the City. (Significantly, this sum is just a few hundred dollars above the $7,029.55 amount requested by plaintiff as sanctions against Defendant CITY OFFICIALS for their obstinate refusal to grant discovery. See CT 397 - 399, at 399. The City filed no declaration on costs or time spent.)

j) Judge Broadman ordered City Attorney Steve Kabot to prepare the order after hearing, and to submit it to Hoar and Park for approval. (CT 717: 14-19; Minute Order, CT 496; clerk omitted Mr. Park's name from the Minute Order.)

e. **Unnoticed Ex Parte Hearing on APPRAISERS' Order**. Contrary to Judge Broadman's Order of August 23 (CT 717:14-19; Minute Order, CT 496) that City Attorney Steve Kabot prepare an order for sub-

mission to Hoar and Park, Attorney Gordon Park presented Judge Broadman with a separate Order which was signed by Judge Broadman and filed September 17, 1990. (CT 549 - 553) This was a **de facto ex parte** hearing. Plaintiff was not given prior notice of any application nor of the hearing for presentation and signing of an Order separate from the one being prepared by City Attorney Steve Kabot; no finding of such notice is made in the separate Order of September 17, 1990. (CT 549-553).

f. **Plaintiff's Steps to Disqualify Judge Howard Broadman**.

1) Verified Statement of Leonard C. Hoar, Jr. On September 27, 1990, Plaintiff's attorney filed a Verified Statement to disqualify Judge Howard Broadman on Grounds of Conflict of Interest, Bias, and Prejudice. (CT 600 - 621) This action was based in part upon defendant DIANA DOOLEY'S role as

Broadman's campaign manager in his 1988 judicial retention election. Plaintiff's First Amended Verified Statement further advised of defendant DIANA DOOLEY'S then current (July-September, 1990) activities to help elevate Judge Broadman to the 5th District Court of Appeals. (CT 603: 23 - 605:14)

2) Judge Broadman Disqualified. On November 9, 1990, The Honorable John N. Phillips, Judge of the Superior Court, Monterey County, issued his decision disqualifying Judge Howard Broadman. (CT 728-729) The order was filed in Tulare County November 16, 1990. (CT 728) At that time, County Clerk Ernest A. Maggini, Monterey County, sent a Receipt for Records, which shows that Judge Phillips did not receive the First Amendment to the Verified Statement (CT 727), nor copies of Judge Broadman's

Minute Orders. (See p. 25: 25 - 26: 9, above.) (A copy of the Order is set forth at App. at p. 71.)

g. **Verified Statement To Disqualify The Honorable John P. Moran**. On February 14, 1991, Plaintiff filed a Verified Statement by his Attorney LEONARD C. HOAR, JR., on the ground Judge John P. Moran had not disclosed his wife's interest exceeding 10%, worth more than $100,000, in Hein Ranch (Lone Star Quarry), which sold the sand, gravel, and aggregate for construction of the Radisson Hotel, which is the subject of this lawsuit. (CT 920 - 978)

1) Recusal of Judge John P. Moran. On February 20, 1991, Judge John P. Moran recused himself from sitting on this case. (CT 979 - 981) (A copy of the recusal is set forth at App. 74.)

h. **Inaction By Fifth District Court of Appeal**. While the appeal was pending, Steve L. Kabot, City Attorney, City of Visalia, and Kathy Jensen, Rutan & Tucker, Special Counsel for the City of Visalia, went behind Hoar's back, met directly with plaintiff, and obtained a dismissal of the appeal without Hoar's knowledge, consent, approval, or participation. When Hoar refused to to along, defense counsel on February 10, 1992, moved the Court of Appeal for dismissal and sanctions against Hoar for Hoar's refusal to go along. Extensive briefing followed. The Court of Appeal denied the motion to dismiss, but without comment or noticed action to plaintiff for defense counsel's violation of **State Bar Rules of Professional Conduct**, Rule 2-100, and without imposition of sanctions for an egregious violation of the rules of professional conduct.

5. **ARGUMENT**

a. **Third Amended Complaint A Valid Statement of Causes of Action**. The Third Amended Complaint is a valid taxpayer's action setting forth 10 different causes of action. It is a valid exercise of the First Amendment right to petition the government for redress of grievances through the filing and prosecution of a lawsuit.

1) The filing and prosecution of the Third Amended Complaint is conduct protected by the First Amendment. Each citizen, including plaintiff and counsel, is entitled to the constitutionally guaranteed right to petition the government fore the redress of legitimate grievances. **Constitution of the United States, First Amendment; California Constitution**, Article I, Section 3.

2). The Noerr-Pennington Doctrine. The United States Supreme Court has held that the right to petition protects the freedom to seek redress from all three of the coordinate branches of government. **Eastern R. Conf. v. Noerr Motors** (1961) 365 U.S. 127, 81 S Ct 523, 5 L Ed 2d 464; **Mine Workers v. Pennington** (1965) 381 US 657, 669-672, 85 S Ct 1585, 1592-1594, 14 L Ed 2d 626, which together made up the **Noerr-Pennington** doctrine.

3) Petition Includes Court Access. "Certainly the right to petition extends to all departments of the Government. The right of access to the courts is but one aspect of the right of petition." **California Transport v. Trucking Unlimited** (1972) 404 US 508, 510 92 S Ct 609, 611, 30 L Ed 2d 642. And the power of states to control practice of law cannot be exercised so as to abrogate federally protected rights. **Johnson v.**

Avery (1969) 393 U.S. 487, 790, 89 S.CT. 747, 751, n. 11 (citing **NAACP v. Button** (1963) 371 U.S. 415, 83 S.Ct. 318, 9 L.Ed.2d 405; **Sperry v. Florida** (1963) 373 U.S. 379, 83 S.Ct. 1322, 109 L.Ed.2d 428.)

4) Criticism of Government Privileged. Criticism of government is absolutely privileged. **City of Albany v. Meyers** (1929) 99 Cal App 651, 179 P 213.

5). Suit Against Government Privileged. The right of petition protects attempts to obtain redress through institution of judicial proceedings as well as through importuning executive officials and legislature; right encompasses act of filing lawsuit solely to obtain monetary compensation for individualized wrongs as well as filing suit to draw attention to issues of broader public interest or political significance. **City of Long Beach v. Bozek** (1982) 31 Cal.3d 527, 183 Cal Rptr 86, 645 P2d 137,

vacated, 459 US 1095, 74 L Ed 2d 943, and remanded; reaffirmed 33 Cal3d 727, 1909 Cal Rptr 918, 661 P2d 1072.

6) State Provided Rights Serve As Foundation for Federal Rights Actions. Plaintiff's federal civil rights action is also founded upon protected interests in property, which are created and their dimensions are defined by an independent source such as state statutes or rules entitling the citizens to certain benefits. Board of Regents v. Roth (1972) 498 US 564, 577, 92 S Ct 2701, 2709, 33 LEd2d 548; Goss v. Lopez (1975) 419 US 565, 95 S Ct 729, 42 L Ed2d 725. In this case, the protected rights arise under the Charter, City of Visalia, Article VI, Section 16 (the City of Visalia shall not authorize a lease of city property in excess of 5 years unless approved by Or-

dinance) and under Article XIV, Section 1 (City may grant an exclusive franchise only by ordinance.)

7) Egregious Wrongs Require Judicial Relief. Plaintiff, with the assistance of counsel, is seeking to address an egregious wrong by defendant City officials against the taxpayers, voters, and residents of the City of Visalia. The detailed charges and specifications clearly shows the good faith and seriousness of plaintiff and counsel in bringing this issue before the court for resolution and justice, since it shall never come from the defendant CITY OFFICIALS.

8) Sanctions A Chilling Effect on First Amendment Rights. Sanctioning counsel places a chill on plaintiff's exercise of his First Amendment Rights. If counsel are sanctioned for being detailed in charges and specifications, that fact in turn shall discourage other

counsel from entering this thorny thicket of local politics -- and all too few are even willing to look at this type of case to begin with, let alone undertake it.

b. **Court Actions Below Served To Deprive Petitioners of Their First Amendment Rights**. From the moment that attorney Petitioner Leonard C. Hoar, Jr., entered the case, Petitioners have encountered a series of judicial stumbling blocks and actions to thwart Petitioners' exercise of First Amendment rights through the filing and prosecution of a lawsuit against a governmental entity.

1) **Demurrer Hearing of February 28, 1990**. (See App. p. 64) The Court took the position that no further amendments would be allowed, and warned Petitioners to plead as thoroughly and completely as they could. (See App. 64.)

2) **Discovery Order**. On August 2, 1990, Judge John P. Moran entered his order on Petitioners' motion to compel production of documents and for sanctions. Instead of deciding the motion, he referred it out to a Rent-A-Judge, mandating that Roy J. Kendall put up cash up front in order to obtain relief from the defendants' refusal to produce. This judicial act altered the financial balance of the case and weighted it in favor of the City Defendants. See copy of Judge Moran's order at Appendix p. 116.

3) **Demurrer Hearing, August 23, 1990**. At the demurrer hearing, the Judge Howard R. Broadman sustained the demurrer without leave to amend in the first demurrer ruling on a complaint prepared by Petitioner Roy J. Kendall's attorney Petitioner Leonard C. Hoar, Jr.

a) Facts Deemed Admitted. Issuable facts properly pleaded in the complaint are deemed admitted, however improbable they may be, when the defendant tests the legal sufficiency of the complaint. **Woodroof v. Howes** (1891) 88 C. 184, 189, 26 P. 111; **Griffith v. Dept. of Public Works** (1956) 141 C.A.2d 376, 381, 296 P.2d 838. A general demurrer will be overruled if the complaint contains allegations of every fact essential to the statement of a cause of action, regardless of mistaken theory or imperfections of form which make it subject to special demurrer. **Johnson v. Clark** (1936) 7 C.2d 529, 536, 62 P.2d 767.

b) Rule Permitting Amendment. The rule of permitting amendment is chiefly applied where the defect is one of **form**, raised by **special demurrer**, and the elements of a cause of action are stated, even though the plaintiff has failed

several times to file a good pleading. **Wennerholm v. Stanford University School of Medicine** (1942) 20 C.2d 713, 719, 128 P.2d 522 [fifth amended complaint]; the same approach is used where the defect, though raised by **general demurrer**, nevertheless relates to the **form** of the statement; e.g., allegations of conclusions of law instead of ultimate facts. **Eustace v. Dechter** (1938) 28 C.A.2d 706, 711,- 83 P.2d 523 [fourth amended complaint]. In other words, a general demurrer should not be sustained if the pleading, liberally construed, states a cause of action on any theory. **Lloyd v. California Pictures Corporation** (1955) 136 C.A.2d 638, 642, 289 P.2d 695.

c) The First Cause of Action States a Cause. The FIRST CAUSE OF ACTION states a cause of action against

Defendant CITY OFFICIALS for waste and Illegal Expenditure of Public Funds and Property:

1) **Failure to Exercise Due Care in Expenditures of Public Property and Money.** (CT 45: 17 - 58: 28) This part includes the 28 specific acts; (CT 43 - 54) **Stanson v. Mott** (1976) 17 Cal.3d 206, 130 Cal. Rptr. 697. Among the most significant illegal acts is making a gift of $2.9 million public funds from the City of Visalia to VISALIA CONVENTION CENTER HOTEL, INC., a private corporation, in violation of **Constitution of the State of California**, Article XVI, Section 6, and **CHARTER, CITY OF VISALIA**, Article III, "Powers of City," Sections 1 and 2, and Article VI, "Legislative. The Council. Powers and Duties.", Sections 4 and 16. (CT 49: 22-28)

2) **Fraud and Collusion.** (CT 59: 1 - 62: 25) The standard for fraud and collusion is set forth in **Gogerty v. Coachella Valley Junior College District** (1962) 57 Cal.2d 727, 21 Cal. Rptr. 806, 371 P.2d 582, and **Lusk v. Compton City School Board of Education** (1967) 252 C.A.2d 376, 377-379, 60 Cal Rptr 426. This portion applies specifically to defendant ALAN T. MCINTOSH, who as City Councilman voted for the Convention Center Hotel project, resigned, and then obtained through his corporations the air conditioning and plumbing contracts for the Visalia Convention Center Hotel. This act violated **Government Code** Sections 1090 and 1097. His resignation from his council post does not excuse the violation. **Stigall v. City of Taft** (1962) 58 C.2d 565.

3) **Failure of Public Officials to Perform a Duty Specifically Enjoined.** (CT 59 - 65) This standard is set forth in **Harmon v. City and County of San Francisco** (1972) 7 Cal 3d 150, 101 Cal Rptr 880, 496 P.2d 1248. Defendant CITY OFFICIALS' conduct is set forth at CT 63: 3 - 67: 14.

e) **Pleading With Particularity Required**. Five of the causes of action required pleading with particularity: (1) Individual Liability of Public Officials for Waste and Illegal Expenditure of Public Funds and property; (3) Removal of Public Officials From Office; (5) Fraud; (6) Civil Rights; and (7) RICO. (Plead below; CT 529:22 - 531:4)

f) **Petitioners Plead Both Too Much and Too Little**. Judge Broadman complained that the complaint was too long. However, petitioners were thrown

out of court on the civil rights cause of action for the inadvertent omission of a single fact which could have been supplied on amendment. In short, Petitioners were thrown out of court both because they plead too much and because they plead too little. (See Appendix, p. 28)

4) **Court's Changing Petitioner's Cause of Action**. Petitioner Roy J. Kendall exercised his common right under California law to choose his own cause of action, a taxpayer's action under **Code of Civil Procedure** Section 526a. He chose not to file a "validating action" under **Code of Civil Procedure** Sections 860 et seq.

a) Plaintiff's Right to Choose His Cause of Action. The courts have tended to be quite liberal in giving the plaintiff his freedom of choice , and have upheld his action of tort or contract as he has seen fit to bring it." Prosser,

Law of Torts 4th," Hornbook Series, Chapter 16, "Tort and Contract", Section 92, "Relation Between Actions,", "Election and Gravamen," pp. 618 - 621.

1) It is improper for the Court to impose the Court's choice of cause of action upon Plaintiff. Such an act violates all concepts of Due Process of Law.

b) Tort v. Contract. For example, there appears to be no objection on principle to the plaintiff suing either in contract or in tort at his election. See, e.g., **Crisci v. Security Ins. Co.** (1967) 66 Cal.2d 425, 432, 58 Cal Rptr 13, 426 P.2d 173; **Better Food Markets v. Amer. Dist. Tel. Co.** (1953) 40 Cal.2d 179, 188, 253 P.2d 10. Also, see generally Grossman & Van Alstyne, 7 **Pleading -- Civil Actions**, West's **California Practice Series**, Section 776.

c) Doctrine of Election of Remedies. The doctrine of **election of remedies** deals with the effect of choice of one of several inconsistent remedies. Although the doctrine was held inapplicable in **Mansfield v. Pickwick Stages** (1923) 191 Cal. 129, 130, 215 P. 389, the Court in that case did set forth the doctrine.

d) Plaintiff Elects Code of Civil Procedure Section 526a. Plaintiff has elected to sue under **Code of Civil Procedure** Section 526a, the taxpayer suit theory, with a statute of limitations of 3 years under **Code of Civil Procedure** Section 338, statutory liability. Plaintiff is free to avoid the validating action under **CCP** Section 860, et seq, especially since a cause of action under that statute has never accrued.

e) Judge Howard Broadman threw out First, Second, Fourth, and Tenth Causes of Action on the grounds that they were all based upon the validation statutes with a 60-day statute of limitations.

f) Plaintiff's Authority and Standing to File Taxpayer's Action. California courts have consistently construed **Code of Civil Procedure** Section 526a liberally to achieve its remedial purpose. See, e.g. **Van Atta v. Scott** (1980) 27 Cal.3d 424, at 427, 166 Cal.Rptr. 149, at 161, 613 P.2d 210. "The primary purpose of this statute, originally enacted in 1909, is to 'enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement'" **Blair v. Pitchess** (1971) 5 Cal.3d 258, 267-268, 96 Cal.Rptr. 42, 48-49, 486 P.2d 1242. That

section provides "a general citizen remedy for controlling illegal governmental activity." **White v. Davis** (1975) 13 Cal.3d 757, 763, 120 Cal.Rptr. 94, 98, 533 P.2d 222; **Wirin v. Parker** (1957) 548 Cal.2d 890, 894, 313 P.2d 844.

h) **Filing A Representative Action**. A taxpayer's representative action on behalf of a public entity is similar to a corporate shareholder's derivative action. **Osburn v. Stone** (1915) 170 Cal 480, 482-483, 150 P 367.

i) The trial Court Erred in Applying the 60-Day Statute of Limitations Under C.C.P. Section 863 to Causes of Action Not Involving A Validating Action. The draconian result was to infringe upon the right to petition for redress of grievances under the First Amendment.

j. **C.C.P. Section 860 Does Not Relieve Public Official of Personal Liability.** The Requirements of **Code of Civil Procedure** Section 860, Assuming They Apply In This Case, Do Not Serve To Relieve Defendants Of Personal Liability for Improper Expenditure of Public Funds.

a) The Court has failed to site a single case stating that the mere existence of a contract between the public agency and some private individual is sufficient to absolve a public official of personal liability. Such as ludicrous concept would totally negate the concept of a CCP 526a action.

b) A state statute such as **Code of Civil Procedure** Sections 860 and 863 does not negate, nullify, or cancel out the prohibitions of **California Constitution** Article XVI, Section 6.

c) Although **California Constitution** Article XVI, Sections 3, 4, and 6, enacted afresh by the voters on November 5, 1974, set forth many exceptions to the prohibitions on gifts of public funds, gifts of public funds to private corporations was not included among them.

2) **Code of Civil Procedure** Sections 860 and 863 do not serve as an exception to the liability imposed on public officials under **Stanson, supra, Gogerty, supra, Lusk, supra, Harmon, supra, and Stigall, supra**.

5) A Void Act Is Void.

a) 60-Day Statute Never Started To Run. Because the CITY DEFENDANTS acted illegally, the 60-Day Statute under **Code of Civil Procedure** Section 863 never started to run. The approval of the First Amended Lease and the Guarantee

Agreement were illegal and void from the inception, and the lender, METRO NORTH STATE BANK, knew it.

1) **Charter, City of Visalia**, Article VI, Section 16, mandates and requires that all leases for more than 5 years be authorized by **Ordinance**. (See App. 101-102) Passing an ordinance is the prerequisite to the legitimacy of the 50-year lease of city property to VISALIA CONVENTION CENTER HOTEL, INC. Without use of an Ordinance to approve the lease, the 60-day statute of limitations under **Code of Civil Procedure** Section 860 et seq and **Government Code** Section 53511 never starts to run.

2) There were major changes between the original lease of February 1, 1987, which was lawfully passed by Ordinance, and the First Amended

Lease, which was unlawfully passed by Motion on July 27, 1988. (CT 438: 7 - 445: 2).

b) Plaintiff cited the California case of **The City of Sacramento v. Kirk** (1857) 7 Cal. 419, at 420-421, in which the California Supreme Court held that where by the Charter the city could act only through its corporate authorities, and the original contract was authorized by ordinance, any alteration could be done only by ordinance. Cf. 56 **Am Jur 2d**, "Municipal Corporations, etc.", Section 411, at pp. 453-454, and 62 **Corpus Juris Secundum**, "Municipal Corporations," Section 434, Subsection d, "Requisites and Sufficiency," p. 833, and McQuillan, 6 **The Law of Municipal Corporations, 3rd**, (1988), Sections 2104, 21.05, 21.12 and 21.13.

c) Both Courts below, holding that such a transaction is not void, departed from the ruling established in **The City of Sacramento, supra**. Time does not confirm a void act. **Civil Code** Section 3539.

6) **The Trial Court Applied A Nonexistent Standard To Dismiss the Fifth (Fraud) and Tenth (Negligence) Causes of Action Against City Defendants on Ground Petitioner Failed to File A Claim.**

a) Plaintiff filed a representative action to recover benefits for the public entities, **not** to recover damages against them for his own benefit.

b) **Government Code** Section 905 requires the presentment of claims for money or damages **against** local public entities. This action is not against a local public entity, but rather is submitted on behalf of and for the benefit of The City of Visalia. Section

905(i) specifically exempts claims by the State or by a state department or agency or by another local public entity. Plaintiff is suing in his representative capacity on behalf of The City of Visalia and its related local entities. Accordingly, the Claims Statute is inapplicable.

c) In **Stanson v. Mott, supra** 17 Cal.3d, at 225, 130 Cal. Rptr., at 710, the California Supreme Court stated:

> Although the indemnification provisions of the tort claims act are not directly applicable to an action by or **on behalf of** a public entity to recover moneys misappropriated or illegally expended by a public employee, the act's provisions do reflect a general state policy to limit a public employee's personal financial responsible for errors committed in the course of his public employment. (emphasis added)

1) **The Stanson** Court held that public officials must use "due care," i.e., reasonable diligence, in

authorizing the expenditure of public funds, and may be subject to personal liability for improper expenditures made in the absence of such due care.

2) **Stanson** does not require the taxpayer to file a claim as a prerequisite for filing an action on behalf of the governmental entity against a public official, and **Code of Civil Procedure** Section 526a does not so require. The courts below have not cited any relevant opinion so requiring.

7. **The Trial Court Denied Petitioners' Civil Rights Cause Of Action By Refusing the Relation Back Doctrine**.

a) In light of the prior filing in Federal Court on July 3, 1989, (CT 703: 4-22; 132: 23 - 133: 2, in the Chronology) as pertains to the Sixth Cause of Action, the trial court clearly erred on refusing to apply the doctrine of equi-

table tolling and relation back of the complaint to the filing of Plaintiff's action in federal court on July 3, 1989.

b) Authority for the equitable tolling doctrine is set forth in **Nichols v. Canoga Industries** (1978) 83 Cal App3d 956, 148 Cal Rptr 459; **Bollinger v. National Fire Insurance Company** (1944) 25 Cal2d 399, 409-[410, 154 P2d 399; and **Elkins v. Derby** (1974) 12 Cal3d 410, 115 Cal Rptr 641, 525 P2d 81. See Witkin, 3 **California Procedure 3d**, "Actions," Section 508 et seq.

8) **The Trial Court Sanctioned Petitioner Hoar For Citing Leading Cases**. The Trial Court sanctioned Hoar for misciting three cases to the Court, **Nichols, supra, Bollinger, supra, and Elkins, supra**, after having recessed allegedly to read them. Judge Broadman stated that they did not stand for the proposition of

the equitable tolling of the statute of limitations nor for the relation back doctrine.

9) **Imposition of Sanctions Was Punishment for Having Exercised First Amendment Rights By Filing The Suit, Not For Wrongs Done, and Was An Abuse of Discretion.**

a) None of the conduct set forth in the Statement of Facts, supra, (11: 15 - 13:6) warranted sanctions in any amount, let alone $7,500.

b) **First Amendment Protected Conduct.** Each citizen, including plaintiff and counsel, are entitled to the constitutionally guaranteed right to petition the government for the redress of legitimate grievances. See pp. 31-33, above.

c) The sanctions were imposed without reference to evidence; defendants filed no declarations. See,

e.g., **Summers v. City of Cathedral City** (1990) 225 CalApp.2d 1047, 275 Cal. Rptr. 594.

10) **Dismissal and Sanctions Decision Made Without Considering Merits (Substance) of Third Amended Complaint, Only Its Methodology (Form).** At the hearing on August 23, 1992, (RT 21: 24-25:6, CT 686: 24 - 687:6), Judge Broadman stated:

> "What I am going to have to rule on in this case is not the merits of the complaint that Mr. Kendall has, okay? It is the methodology which he used to get to the problem.
>
> So I want to make it real clear that the rightness or wrongness of what happened here is not what I am ruling on. What I am ruling on is what's been put before me in the legal sense. Do you understand what I'm saying?"

Judge Broadman found that Petitioners actions were frivolously, in bad faith, for the purpose of delay (RT 56: 24-57:1, CT 721:24 - 722:1). The problem is that California **Code of Civil Procedure** Section

128.5 (b)(2) defines "Frivolous" as (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party. (See also Judgment of Howard Broadman, dated November 20, 1990, CT 818-824, a copy of which is attached hereto marked at Appendix p. 51, and a Summary Judgment of John P. Moran, dated January 17, 1991, CT 886-891, a copy of which is attached hereto marked at Appendix p. 61. Since Judge Broadman refused to consider the merits of the complaint, he arbitrarily and capriciously deprived Petitioner of substantive Due Process of Law under the 14th Amendment. Judge Broadman refused to consider that the Third Amended Complaint had merit.

11) **Judge Broadman Chastised Petitioner For Violating Judge Moran's "Orders" of February 28, 1990, Although Judge Broadman Had Not Seen A**

Transcript of That Hearing. In the RT 35:25 - 36:7, CT 700:25 - 701:7), Judge Broadman stated:

> "Then, later at least according to Mr. Kabot's points and authorities, I couldn't find their report, I gave up looking for the reporter's transcript -- at page forty three of the points and authorities, when you were told in the reporter's transcript on 2-28-90, they're to plead ultimate facts and support those theories. Both those court orders were (sic "not") complied with as indicated by this lengthy complaint."

Again, at RT 54:17 - 26, CT 719: 17-26, the following colloquy takes place:

THE COURT: . . . Now, I have taken that -- I still don't know whether in the reporter's transcript that there was a bond filed.

MR. KABOT : It wasn't in the court record, Your Honor, so I --

THE COURT: I may have missed it, but --

MR. KABOT : I don't think -- I have this copy.

THE COURT: It will be marked and received as an exhibit.

The Minute Order of August 23, 1990 (Appendix, p. 62) indicates Court's exhibit #1 Reporter's transcript of 2/28/90, marked for identification.

12) **Judge Moran Issued No Orders On February 28, 1990**. A review of the transcript of the Hearing of February 28, 1990 (Appendix p. 64), before Judge Moran, reveals that absolutely no orders were given to Petitioner. Thus, no orders were disobeyed.

13) **Judge Moran Did Not Order Petitioner To Avoid Pleading the Validity of the First Amended Lease and of the Guaranty Agreement**. Judge Broadman sanctioned Petitioner for attacking the validity of the Lease and/or Guarantee Agreement in violation of the Order of Judge Moran. At the hearing of February 28, 1992, upon inquiry by City Attorney Steve Kabot, Judge Moran specifically

"**authorized**" petitioner to plead anything he wanted to. (See Appendix, p. 64, pp 67 - 69).

a) Accordingly, Judge Howard Broadman sanctioned Petitioner for doing that which Petitioner was specifically authorized to do.

b) Then, Judge Moran, in ratifying Judge Broadman's decision, also sanctioned Petitioner for doing precisely what Judge Moran authorized Petitioner to do.

14) **The Court of Appeal Affirmed Sanctions on Petitioner, But No Sanctions on Steve Kabot and M. Katherine Jensen For Going Behind Petitioners' Back, Meeting with Roy Kendall, and Inducing Roy Kendall To Sign Stipulation Dismissing Appeal Without Petitioner's Knowledge, Consent, or Approval**.

(a) While the case was on appeal, City Attorney Steve Kabot and Special Counsel, M. Katherine Jensen of Rutan & Tucker, met with Roy Kendall and attorney Charles Lazarro at depositions on two other cases by Roy Kendall against the City of Visalia. Depositions began at 9:00 a.m., on January 23, 1992. When the depositions terminated in the afternoon, the attorneys met. Later, without dinner, they called Roy Kendall into the meeting. At or about 9:00 p.m., Kabot and Jensen induced Kendall to sign a stipulation dismissing the case on appeal. Petitioner had no knowledge. Petitioner had not consented. Petitioner had not approved.

(b) When Steve Kabot found the dismissal was not effective without Petitioner's signature, he pleaded, cajoled, and offered to waive even the sanctions if Petitioner would let him off the hook and sign the dismissal.

(c) Roy Kendall, upon reflection, decided he did not want to dismiss, and wanted to proceed with the appeal.

(d) Steve Kabot then filed a motion with Fifth District Court of Appeal to enforce the unethically obtained stipulation and to sanction petitioner for refusing to go along.

(e) Petitioner not only asked the Court of Appeal to deny the motion, but also to sanction City Attorney Steve Kabot for all the work. Although the Court did deny the motion, it did not sanction City Attorney Steve Kabot. But, the Court did affirm sanctions against Petitioner. This is a **double standard of justice**, and a denial of equal protection under the law, under the "Equal Protection Clause" of the **Fourteenth Amendment**.

15) **Court of Appeal Adopted False Standard Re Denying Petitioners' Standing To File Suit**. The Fifth District Court of Appeal, in affirming the decision concerning the negligence cause of action, held that Petitioner had no standing to file the suit under **Kinlaw v. State of California** (1991) 54 Cal.3d 326, 334-335. This was a complete miscite. **Kinlaw** applies to an attempted taxpayers action under Section 526a to enforce Section 6 of Article XIIIB (The Gann Spending Limit). The California Supreme Court noted that the gravamen of the **Kinlaw** action is enforcement of Section 6. (285 Cal. Rptr., at 69.) Article XIIIB, Section 6, enforcement action is governed exclusive through a comprehensive administrative procedure for resolution of claims arising out of Section 6, as set forth in **Government Code** Sections 17500, et seq, and pertains to "state-mandated local costs" and

governs unfunded or undefunded state mandated programs imposed upon counties, cities and districts. It has nothing to do with a negligence action.

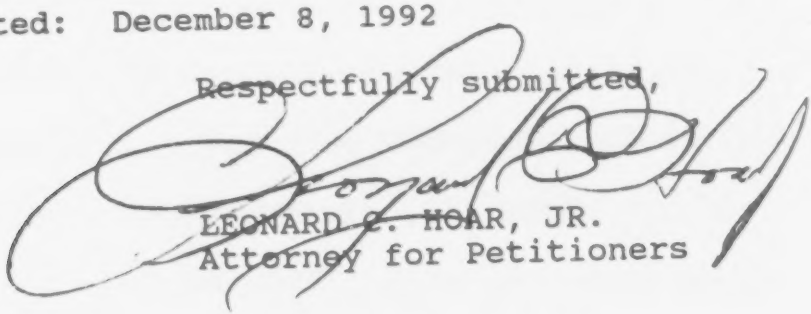
SUMMARY

Petitioners stated valid causes of action in the Third Amended Complaint. The actions by the Courts below deprived Petitioners of their effective exercise of First Amendment Rights to petition government for the redress of grievances through the filing and prosecution of lawsuit against a governmental entity.

WHEREFORE, Petitioners pray that this Court issue a Writ of Certiorari to the Supreme Court of the State of California.

Dated: December 8, 1992

Respectfully submitted,



LEONARD C. HOAR, JR.
Attorney for Petitioners

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROY J. KENDALL, et al,)
)
Petitioners,)
)
v.)
)
THE CITY OF VISALIA,)
et al,)
)
Respondents.)

APPENDIX

TO

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

LEONARD C. HOAR, JR.
Attorney at Law
3948 E. Gettysburg
Fresno, CA 97326
Telephone: (209) 222-3521

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Fifth Appellate District No. F0-15576
S027433

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

ROY J. KENDALL, Appellant

v.

CITY OF VISALIA,
et al., Respondents

LEONARD C. HOAR, JR., Appellant

Supreme Court
FILED
Aug 12 1992
Robert Wandruff Clerk

Petition for review DENIED.

LUCAS
Chief Justice

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED
June 5, 1992
Kevin A. Swanson, Clerk
By_____
Deputy

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

ROY J. KENDALL,	)	F015576
	)	
Plaintiff and Appellant,	)	(Super.Ct.No. 139050)
	)	
v.	)	ORDER DENYING PETITION FOR HEARING
	)	
CITY OF VISALIA, et al.,	)	
	)	
Defendants and Respondents;	)	
	)	
LEONARD C. HOAR,JR.	)	
	)	
Appellant.	)	
	)	

THE COURT:

Appellants' petition for rehearing filed in the above entitled case is denied.

DATED: June 5, 1992

/s/ Vartebedian
Vartebedian, J.

WE CONCUR;

/s/ Martin
Martin, Actin P.J.

s/s Buckley
Buckley, J.

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED
May 19, 1992
Kevin A. Swanson, Clerk

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

ROY J. KENDALL,	)	No. F015576
	)	
Plaintiff and	)	(Super. Ct.
Appellant,	)	No. 139050)
	)	
v.	)	O P I N I O N
	)	
CITY OF VISALIA et al,	)	
	)	
Defendants and	)	
Respondents;	)	
	)	
LEONARD C. HOAR, JR.,	)	
	)	
Appellant.	)	
	)	

APPEAL from a judgment of the Superior Court of Tulare County. John P. Moran, Edward Kim, and Howard R. Broadman, Judges.*[1]

---

1. *Judge Moran signed the order of January 17, 1991, imposing sanctions against appellant's counsel and sustaining demurrer without leave to amend; Judge Kim signed the order of March 8, 1991, dismissing the action as to various defen-

Leonard C. Hoar, Jr., in pro. per., and for Plaintiff and Appellant.

McCormick, Barstow, Sheppard, Wayte & Carruth, Gordon M. Park and David H. Bent, McCormick, Kabot, Michner & Foley, S. L. Kabot and M. C. McCarthy, for Defendants and Respondents.

We have two related matters before us: the appeal of plaintiff Roy J. Kendall from a judgment of dismissal of his third amended complaint, and the appeal of plaintiff's counsel, Leonard C. Hoar, Jr., from an order imposing sanctions amount to $7,500 against him personally. Defendants named in the complaint are generally two groups, the "City" defendants and the "appraisers."[2] The third amended com-

---

dants, and the order of March 11, 1991, dismissing the fifth and tenth causes of action against various defendants. Earlier, on August 23, 1990, Judge Broadman heard and ruled upon the demurrer and request for sanctions.

2. The appraiser defendants include Joseph J. Blake & Associates, Inc., Brad

plaint set out 10 causes of action. Not all defendants were named in all causes of action.

Based upon the discussion that follows, we affirm the judgment of dismissal and the order imposing sanctions.

FACTS

Our factual statement is derived from averments contained in the third amended complaint.

On February 1, 1987, the City of Visalia (City) and the Visalia Convention Center Hotel (VCCH) entered into a lease agreement whereby City agreed to lease certain real property to the VCCH on the condition that the VCCH would construct a

---

Paul and Linda J. Hays.

The City defendants include the City of Visalia, Visalia Public Building Authority, the Community Redevelopment Agency of the City of Visalia, individual members of the city council, special counsel to the City of Visalia, and the City of Visalia Director of finance.

hotel on the property. The hotel was to be build immediately adjacent to and connecting with a proposed expansion of the existing Visalia Convention Center which is operated by City.

On July 27, 1988, the Visalia City Council conducted a special meeting where it approved the "First Amended Agreement to Lease," again between City as lessor and VCCH as lessee.

One of the provisions of the first amended agreement to lease was that the City would agree to contribute up to $2.9 million toward VCCH's equity contribution required under the loan if VCCH could not provide any or all of its borrower's equity. The amended agreement further provided that if the City made such contributions to the VCCH's borrower's equity, VCCH would reimburse such advances with interest in the form of additional

rental payments and would pay to the City a percentage of the net operating income from the hotel.

At the same time, in special session, the Visalia City Council, sitting as the governing board of the Redevelopment Agency of the City of Visalia (Redevelopment Agency), approved an agreement between the Redevelopment Agency and Metro North State Bank providing for the Redevelopment Agency to guarantee the partial repayment of the loan from Metro North State Bank to VCCH for the construction of the convention center hotel project up to a maximum of $3 million.

Generally the third amended complaint alleged that all or some of these actions on the part of all or some of the defendants constituted misuse of public office, waste of public funds, conflict of interest, and the like, as will be more fully set forth in our discussion below.

PROCEDURAL BACKGROUND

In July 1989, plaintiff acting pro se filed a complaint for declaratory relief damages and injunction in the United States District Court, Eastern District of California, naming as defendants the City; the Redevelopment Agency; Visalia City Council members Gregory Collins, Allen McIntosh, Mary Louise Vivier, Bob McClain, Don Sharp and Berkley Johnson; VCCH; and Metro North State Bank. We take judicial notice of that complaint.

Certain defendants in that action filed a motion to dismiss for lack of a federal question, and plaintiff voluntarily dismissed the federal action.

In September 1989 plaintiff, again acting pro se, filed his initial complaint in this state action. Before serving any defendant, plaintiff filed a first amended complaint. In November certain City defendants filed demurrers which were

heard by Judge Moran on December 4, 1989; the court sustained the demurrers with leave to amend. The court found that the claims set forth in the complaint were barred by the 60-day statute of limitation contained in Code of Civil Procedure section 863. The court granted leave to amend if causes of action could be stated that were not barred by Code of Civil procedure section 863, and which did not turn on the validity of he lease or the guarantee agreement.

Plaintiff retained counsel Hoar and filed a second amended complaint. Seventeen new defendants were named. Plaintiff realleged and expanded upon his challenge to the validity of the lease and guarantee agreement. Defendants again interposed a demurrer and motion to strike the second amended complaint.

This demurrer was heard on February 28, 1990, again before Judge Moran, who concluded that the second amended complaint was confusing -- plaintiff's legal theories were not clearly delineated nor were the facts upon which the theories were based clearly set forth. Without specifically ruling on the demurrer at that time, the court granted leave to plaintiff "to redo this [c]omplaint." The court admonished counsel to organize his theories and plead ultimate facts to support those theories. The court's initial grant of 60 days to refile was extended to 90 days.

A third amended complaint was filed on May 30, 1990; it contained 123 pages, 10 causes of action and added 13 more defendants. Even though the complaint was divided into 10 causes of action, the

heart of he complaint continued to be the challenge to the lease and the guarantee agreement.

In July 1990 demurrers were interposed by the appraiser defendants and by the City defendants, along with a motion to strike certain parts of the third amended complaint. This demurrer was argued on August 23, 1990, before Judge Broadman.

The appraisers' demurrer was sustained; plaintiff was denied leave to amend with the exception of the fifth and tenth causes of action. City's demurrer also was sustained; leave to amend was denied except as to the seventh cause of action. Plaitiff was given 90 days' leave to amend the fifth, seventh and tenth causes of action. Judge Broadman concluded, as Judge Moran had, that any cause of action based on the lease or the

guarantee agreement was barred by the limitations provision of Code of Civil procedure sections 860 and 863.

The court granted the City's motion to impose sanctions personally against attorney Hoar in the amount of $7,500.

Plaintiff brought a motion for reconsideration and on the date of hearing on that motion filed a motion to disqualify Judge Broadman both prospectively and retroactively. Judge Broadman was ultimately disqualified prospectively.

The motion for reconsideration was heard before Judge Moran. He denied the motion and signed an order sustaining the demurrer without leave to amend as to all causes of action except the seventh and sustaining the imposition of the sanctions.

Plaintiff then attempted to disqualify Judge Moran for cause both prospectively and retoactively, but on February 20, 1991, Judge Moran recused himself from all future proceedings in the case.

Judge Kim signed a judgment dismissing the action.[3]

DISCUSSION

On appeal, plaintiff argues that it was error to sustain the demurrer without leave to amend.[4] He further contends cer-

---

3. As a result of plaintiff's failure to file a fourth amended complaint as to the fifth, seventh, and tenth causes of actions,those causes of action were dismissed as part of the judgment of dismissal of the entire action.

4. Plaintiff asserts in the heading to this argument that the court's ruling on August 23, 1990, on the third amended complaint was made at "the first substantive hearing on demurrer after plaintiff obtained counsel." To the contrary, it is clear that Attorney Hoar was the attorney of record on the second amended complaint and appeared at the hearing on demurrers conducted on February 23, 1990; rather than sustain those demurrers, the court gave hoar 90 days to "redo' the complaint, as we have already discussed.

tain causes of action "call for specific, detailed pleading," which he had set forth; the one-year and three-year statute of limitations should have been applied rather than the 60-day statute of limitations in Code of Civil Procedure section 863; he should have been allowed "relation back" to the filing of the federal lawsuit in July 1989; and the government claims statute did not apply to any of his claims.

As to the judgment of dismissal of appraisers, plaintiff asserts that it was error for the order to have been obtained "in an ex parte hearing without notice to plaintiff and which judgment was contrary to the oral judgment announced in court."

Finally, plaintiff agues that it was error for Judge Broadman "to refuse to send all verified statements against him to the judge reviewing the motion for his disqualification." Such an issue relating

to the determination of the question of judicial disqualification is not properly raised on an appeal. (Code Civ. Proc., Section 170.3, subd. (d).) Thus, this issue requires no further discussion.

A general demurrer should not be sustained if the pleading, liberally construed states a cause of action on any theory. (**Lloyd v. California Pictures Corp.** (1955) 136 Cal.App.2d 638, 642.)

Whether a plaintiff who has failed to state a cause of action should be given leave to amend the complaint is entrusted to the discretion of the trial court. (Code Civ. Proc., Section 472a, Subd. (c).) "[W]e decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such

reasonable possibility is squarely on the plaintiff." (**Blank v. Kirwan** (1985) 39 Cal.3d 311, 318.)

The grant or denial of a motion to dismiss, pursuant to Code of Civil Procedure section 581, subdivision (f)(2) on the ground of failure to file an amended complaint following the sustaining of a demurrer to a prior complaint with leave to amend, rests within the sound discretion of the trial court. (**Contreras v. Blue Cross of California** (1988) 199 Cal.App.3d 945, 948.)

To determine (1) whether any cognizable theory was stated in the third amended complaint that should have withstood the demurrers, and (2) whether the trial court abused its discretion in sustaining the demurrers without leave to amend and dismissing the entire action, including those causes for which leave to

amend was granted but no amendment was filed, we will review each cause of action in the complaint.

Plaintiff's first six causes of action in the third amended complaint were virtually verbatim reproductions of the seven causes of action contained in his second amended complaint. Plaintiff added to it almost 100 pages and several more causes of action, most of which still turned on the validity of the lease and the guarantee agreement.

First Cause of Action

Plaintiff's first cause of action was denominated as one for "individual liability of public officials fore expenditure of public funds." Plaintiff admits that the most significant illegal act he alleged in the first cause of action was the "gift of $2.9 million public funds from the City of Visalia to VISALIA CONVENTION CENTER HOTEL, INC." However, to

challenge the so-called gift of public funds contained in the amended lease is to challenge the amended lease, which the trial court determined was barred by the limitations period contained in the Code of Civil Procedure section 863. (See **Stanson v. Mott** (1976) 17 Cal.3d 206.

Section 860 of the Code of Civil Procedure provides as follows:

> "A public agency may upon the existence of any matter which under any other law is authorized to be determined pursuant to this chapter, and for 60 days thereafter, bring an action in the superior court of the county in which the principal office of the public agency is located to determine the validity of such matter. The action shall be in the nature of a proceeding in rem."

Section 863 provides in pertinent part:

> "If no proceedings have been brought by the public agency pursuant to this chapter, any interested person may bring an action within the time and in the court specified by Section 860 to determine the validity of such

> matter. The public agency shall be a defendant and shall be served with the summons and complaint in the action in the manner provided by law for the service a of a summons in a civil action."

Section 869 of the Code of Civil Procedure provides that the procedure set out in the chapter is the exclusive remedy for challenging the validity of matters to which the chapter applies. That section provides in pertinent part: "No contest except by the public agency or its office or agent of any thing or matter under this chapter shall be made other than within the time and the manner herein specified." The documents at issue -- the amended lease the the guarantee agreement -- were entered into in July 1988. Plaintiff's original complaint was not filed until September 1989.

Plaintiff argues on appeal that since the Visalia City Charter requires leases for more than five years be authorized by ordinance, that an amendment must also be passed by ordinance and the failure to pass the amendment to the lease by ordinance means that the lease was never legally authorized, "it never existed legally." Plaintiff argues, "Without use of an Ordinance to approve the lease, the 60-day statute of limitations under **Code of Civil Procedure** Section 860 et seq and **Government Code** Section 53511 never starts to run." (Emphasis in original.)

However, to say that the lease was not a legally valid agreement is not a determination plaintiff could have unilaterally made and then offered as an excuse for noncompliance with the 60-day statute of limitations. The question of validity of an agreement must be made by a court of competent jurisdiction. In order for a

court of competent jurisdiction to make that decision, the issue must be brought before it within the 60-day limitation period.

As the city defendants point out, California courts have consistently held that the statute of limitations provisions contained in Code of Civil Procedure sections 860 and 863 apply in cases "where the contract in question is such that the agency's ability to operate would be substantially impaired absent a prompt validating procedure as to the contract. In particular, where the possibility of future litigation might likely have a chilling effect upon potential third party lenders, resulting in higher interest rates or even total denial of credit, either of which might impair the public agency's ability to conduct matters of public purpose, the 60-day limitation period found in the validating statutes

governing validation actions are applicable. (**Graydon v. Pasadena Redevelopment Agency** (1980) 104 Cal.App.3d 631 . . . .)"

To adopt plaintiff's argument would mean that if the amended lease was null and void from its inception, then theoretically plaintiff could wait 10 years until the hotel complex was completed to bring his case of action. In this vein, plaintiff argues in his reply brief, "The accrual act never occurred; thus, the time period for the commencement of the statute to run never began." Plaintiff's argument clearly fails; if an accrual act never occurred, he has no cause of action; and if an accrual act did occur, the cause of action is barred by the statute of limitations.

Second Cause of Action

The second cause of action was for declaratory relief. It named only City defendants. The claim was that the city council acted in contravention with the city charter in failing to have the lease amended by ordinance. This is simply a rehash and another way of phrasing plaintiff's argument that the lease is invalid. Any such argument is barred by the applicable statue of limitations.

Third Cause of Action

Plaintiff's third cause of action, for removal of defendant city officials from office, is again based on the allegation that the city officials acted illegally in entering into the amended lease and guarantee agreement. Not only is this cause barred due to untimely filing, but plaintiff failed to present any authority indicating that such a remedy was available under the methods undertaken by plaintiff.

Fourth Cause of Action

The fourth cause of action was for injunction to prevent a waste of public funds, preventing a waste of public property and compelling the defendant city officials to perform their duties within the limits and restrictions of the California Constitution and the charter of the City of Visalia. Again, the cause turns on question of the validity of the lease agreement. Because any action questioning City's entry into the lease and the guarantee agreement was barred, plaintiff could not state a viable cause of action requesting this injunctive relief. Appraisers were not named in the fourth cause of action and the court likewise properly sustained their demurrer to it.

Fifth Cause of Action

Plaintiff attempted to state a cause of action for fraud in the fifth cause of action. The gist of the plaintiff's complaint in this regard was contained in the following statement: "The true facts were that the individual defendants, and each of them, were violating the Charter, City of Visalia, statutes, and Constitution of the State of California, and ensnarling and emeshing [sic] the taxpayers, voters, and residents in a financial money and asset consuming trap of unconscionable dimensions in the misuse and abuse of public funds and property."

It is settled that the filing of a timely claim against the employing public entity is a condition precedent to a tort action against either of the public entity or the employee. (**Mazzola v. Feinstein** (1984) 154 Cal.App.3d 305, 310.) Because there was no allegation that plaintiff

complied with the government tort claim statute, this cause is barred. (Gov. Code Section 810 et seq.)

Additionally, the only facts alleged in this cause of action are incorporated by reference from earlier causes of action in which plaintiff complaints of the defendants entering into the amended lease and the guarantee agreement. Thus, the fifth cause of action also fails.

Sixth Cause of Action

The sixth cause of action, for civil rights violation, again argued that it was the lease amendment from which the civil rights violation arose. Plaintiff's counsel conceded during oral argument that the one-year statute of limitations in California for bringing a civil rights violation action could preclude the action from proceeding against any of the named defendants except those who were listed in the initial federal complaint. That

original complaint named only the City of Visalia; the Redevelopment Agency of the City of Visalia; and city council members Gregory Collins, Allan McIntosh, Mary Louise Vivier, Bob McClain, Don Sharp, and Berkley Johnson.

The trial court determined that any action was barred, even as to the parties named in the original federal lawsuit, since the dismissal of that suit and its subsequent refiling did not toll the running of the one-year statute period. The third amended complaint does not include any allegation regarding the filing of the original federal lawsuit. Therefore, plaintiff has no basis for raising the fact that a lawsuit was filed as a means of introducing his relation-back/equitable-tolling doctrine.

In any event, **Wilson v. Garcia** (1985) 471 U.S. 261 characterized all 42 United States Code section 1983 actions as in-

volving claims for personal injuries. It is for this reason that the one-year statute of limitations of Code of Civil procedure section 340 is applicable since that is the statute of limitations for personal injury litigation. Due to the nature of the original federal lawsuit, the relation-back and/or equitable-tolling doctrine cannot possibly be relied upon by plaintiff with regard to the federal complaint.

Seventh Cause of Action

As to the seventh cause of action, a so called-RICO violation (Racketeer Influenced and Corrupt Organizations, 18 U.S.C. Section 1961), plaintiff conceded that the seventh cause of action was subject to demurrer as stated and that he needed to proceed with discovery. The court sustained the demurrer with leave to amend, providing appellant 90 days to do additional discovery and amend the cause

of action. No discovery was ever conducted and no amendment was ever filed. Therefore, the seventh cause of action was appropriately dismissed as part of the dismissal of the action. No abuse of discretion occurred.

Eighth Cause of Action

Plaintiff conceded that the eighth cause of action for lender liability did no involve any of the city entities or city officials. It involved only the lenders who, apparently at the time of the hearing on the demurrer, had not answered the complaint even though plaintiff represented that they had been served. The appearing defendants' demurrer to this cause of action was sustained.

Ninth Cause of Action

The ninth cause of action was for accounting, which again was based on the allegation that there was some illegality o impropriety in the terms of the amendment

to the lease agreement or the guarantee agreement. The trial court properly determined that the accounting cause of action failed because of the failure of the first cause of action, upon which the accounting cause of action was based.

Tenth Cause of Action

Negligence was the theory stated in the tenth cause of action. Plaintiff conceded in his third amended complaint that the defendants were all either public agencies or public officers. Since this cause of action was one claiming government tort liability, this cause fails for the same threshold reasons as was discussed above regarding the fifth cause.

Plaintiff argues that he has filed a representative action to recover money for the benefit of the public entities and not an action against the public entities. the flaw in plaintiff's argument is that he has no standing to sue as a representa-

tive of the public entities. Government Code section 905, subdivision (i) provides that a public entity may be exempt from the claims requirement under certain circumstances, but that the right is the right of the local agency and not of an individual taxpayer. (**Kinlaw v. State of California** (1991) 54 Cal.3d 326, 334-335.)

As City points out, "The principal thrust of [plaintiff's] Third Amended Complaint is a desire on his part to substitute his discretion and his opinion for that of the governing bodies and the public officers and employees of said governing bodies. To grant [plaintiff] the right to pursue his Third Amended Complaint would be tantamount to authorizing a taxpayer to seize control of the City and decide whether or not a suit should be brought in the name of the City against

third parties who are alleged to have committed some act or omission giving rise to possible liability to the City."

Dismissal of Complaint Against Appraisers

Plaintiff contends that the entry of the order dismissing the fifth and tenth causes of action on the basis of Judge Broadman's order of September 17, 1990, was a violation of the Rules of Court regarding ex parte orders.

That argument was never raised in the trial court and may not be considered for the first time on appeal. (**McKinny v. Board of Trustees** (1982) 31 Cal.3d 79, 94, fn. 9.) In any event, the order was by no means an ex parte order, having followed a regularly noticed hearing on the appraisers' demurrer to the third amended complaint. Plaintiff filed an opposition to the demurrer and participated in a relatively detailed hearing on the demurrer on August 23, 1990. The order signed

on September 17, 1990, merely reflected the decision made at the hearing. having that same order reduced to writing can in no way prejudice plaintiff.

Sanctions

Hoar argues that it was error to sanction him $7,500 because the trial court's bases for the imposition of the sanctions were inaccurate and his filing of the complaint "constitutes a defacto petition to government guaranteed as a First Amendment right."

"The order imposing sanctions is appealable as a final order on a collateral matter directing the payment of money. [Citation.] . . . Although [the complained-of attorney] is not a party to the underlying action, he is a party of record in the collateral matter by virtue of the trial court's order and has stand-

ing to appeal. [Citations.]" (**In re Marriage of Gumabao** (1984) 150 Cal.App.3d 572, 74, fn. 2.)

Code of Civil Procedure section 128.5 authorizes a trial court to order a party's attorney to pay reasonable expenses, including attorney's fees, for, among other actions, frivolous tactics; frivolous tactics include filing pleadings "totally and completely without merit."

"Upon appeal from imposition of sanctions pursuant to Code of Civil procedure section 128.5, this court will not reverse unless the trial court has abused the broad discretion it enjoys." (**Olson Partnership v. Gaylord Plating Lab. Inc.** (1990) 226 Cal.App.3d 235, 240.)

At the hearing on the demurrer to the third amended complaint on August 23, 1990, the trial court granted the City's

motion for sanctions and set the amount at $7,500. We set forth the comments made by the court in granting the request:

> "I'm going to grant the motion for sanctions. I want to tell you why I'm grating the motion for sanctions, and Mr. Kabot, you're directed to prepare a order in conformity with this Court's order and submit it to Mr. Hoar ad Mr. Park for approval.
>
> "Judge Moran told you, Mr. Hoar, to organize your theories and plead ultimate facts to support thereon. I don't think there is any question about that. He told you to do that. You had like a forty page complaint. Now, I get a one hundred twenty nine page complaint. I don't care because i would have rather read something else last night. I want to tell you why. I'm going to read into the record the introduction. 'Elected appointed officials of the City of Visalia aided by the Community Redevelopment Agency of the City of Visalia and the Visalia Public Building Authority are illegally building a private motel on city land with city and agency public funds through various straw men and other agents.
>
> "['']These same public officials have evaded a referendum election on their actions by using a method of approving their

actions other than by ordinance as required by the City Charter. These officials rejected a slightly defective initiative petition opposing the hotel project. that petition had the qualifying number of signatures.

"[']These same public officials are making illegal gifts of public monies and property as part of the hotel transaction, and have concealed the true nature and consequences of their conduct from the public.'

"If all of that is true and I am not saying it is true and I'm not saying it isn't true, it doesn't belong in the introduction to a complaint. That is not how you draft a complaint. I am talking about Civil Procedure 101, or any . . . parallel. I would like to say there is no such thing as an introduction like that. I have never seen this on a complaint. I've drafted a bunch. I read them all the time. I have never had a speech in the beginning of a complaint and the speech is inappropriate ad it shouldn't be done.

"I have never in -- this is a great chronology of events going way back here. [Apparently the court is referring to the 14-page 'Appendix' that Mr. Hoar appended to his 123-page complaint.] He goes on page after page after page. It starts out talking about a check in the amount of

seven dollars and fifty two cents by William Courtney. That is information that is not properly in a complaint. It's not the kind of thing this Judge wants to read. It's not the kind of thing that lawyers should put in a complaint. A chronology of events is nice prose, but it's not what you do after a judge tells you to organize your theories and plead ultimate facts to support thereon.

". . . . . .

"In addition to those two various, simple examples, this complaint is replete with improper and irrelevant materials. I am not going to cite chapter and verse. I don't think I need to in order for this to be a valid order, but I do think I need to tell you why, what it is because there is an abeyance in every case. I am not making the order based on this, but a review of the file indicates that you were supposed to file an amended complaint back on May 3th, . . . There was a motion or something you came into court the last minute. You had something to file. At least from my review you waited until the last minute. That's just some background information, then you filed late papers in this case.

"I want to read from those late papers in this case because I had to read it, okay? I don't like reading it. I don't think I

should have to read it. Whether or not your doctor was concerned or unconcerned is of no consequence or merit. It makes no difference to me.

"I read from your first page. 'Due to a change in medication by my doctor in June and again in July, I started to get behind in July. My doctor had eliminated the 3200 miligrams [sic] of Ibuprofin, anti-inflammatory medication for knees, which I might tell is not a prescription drug, a day in June and then cut my codeine in half for pain, my knees, in July. Notwithstanding my complaints of increased pain and a return of exhaustion and fatigue my doctor seemed unconcerned at the time.' What do I care" I am a judge.

"If you file things late, you say you filed them late. You had a problem. But it gets even worse. 'On Saturday, August 4, as I approached my girlfriend's house -- [']I don't care about your girlfriend. I man it's irrelevant to me. ['']And then her three and a half year old son, Shawn, who has become like my own son after the past three and a half years, ran out to greet me as I was coming to a halt. He had an accident.['] You know, that's this paragraph on page two. It's a ten sentence paragraph. I don't care. He was injured. I was injured on such a night. We had to go to the

hospital. That's one thing, but to go all through this other stuff about your girlfriend.

"Then it goes on about when you missed a hearing in court. I am sorry. But you're a lawyer and I am a judge. I have to rule on the evidence as it comes out. And your act in this case seem to me to be in many cases are done frivously [sic], with bad faith, for the purposes of delay, and are things that litigants should not have to pay for.

Now, in addition to all of that, not reviewing your own cases that you cited to the Court and then re-telling me that I should look at those cases and then admit they came out of the Cal Juror [sic] and they stand for the proposition that you think it is and coupled with the rest of this is further indication and indicia of the wrong acts that you have undertaken which are sanctionable under Section 128.5, therefore, as much as I hate to do it, I can tell you I have never done this before, okay? So I don't like doing this and I don't take it lightly, but the cost to these people for filing all of this paper work in this case has been very substantial. Just the time to review it was very substantial. I don't get paid per hour. They do. They are in excess of one hundred dollars an hour, but I'm awarding sanctions in the amount of seventy five hundred dollars to

> the two of you together and that will be divided up between the two of you."

The court then, upon noting that only counsel for City had requested sanctions, ruled that the $7,500 would go solely to the City and that it was directed personally against Hoar.

On appeal, Hoar lists the reasons he alleges that Judge Broadman used to support his order and argues that none of the reasons support the sanctions.

Hoar argues that he was sanctioned because he violated Judge Moran's "nonexistent orders," because Hoar obtained an extension of time from Judge Moran in which to file the third amended complaint, because of the form of the declaration of the application for leave to file late papers, because of Hoar's miscitations to Judge Broadman during the

hearing on the demurrer and because Hoar's complaint was frivolous, in bad faith and for the purpose of delay.

Hoar argues that "[n]ot only were many of Judge Broadman's complaints totally unfounded, but the rest simply did not warrant sanctions."

In December 1989, apparently before Hoar was participating in the case, Judge Moran ruled that the causes of action in the first amended complaint based on the alleged illegality of the amendment to the lease and the guarantee agreement were barred by the limitations provision contained in Code of Civil procedure section 863; plaintiff could amend his complaint if he liked to attempt to allege causes of action not based on the alleged illegality of the lease and the guarantee agreement. Even though Hoar was not yet counsel of record at the time of that ruling, when he assumed representation of plaintiff, it

was his duty to ascertain directions given by the court as to what causes of action would not withstand a demurrer if realleged. If he ascertained those directions, he nonetheless failed to follow them in preparing the second amended complaint. In fact, at the next hearing on demurrers in February 1990, Judge Moran personally told Hoar to clarify his legal theories and to allege ultimate facts in support of his theories.

Regardless of whether or not plaintiff had been specifically ordered not to allege the invalidity of the lease agreement, he was certainly instructed to clarify his legal theories and plead ultimate facts. We note that Judge Broadman did not cite any alleged "order" by Judge Moran regarding Code of Civil Procedure section 863 as a basis for the sanctions.

Hoar attempts to justify the length of the third amended complaint based on the need to plead ultimate facts. However, his pleadings are more repetitive than thorough. The third amended complaint swelled from 40 to 123 pages. The reader must slog 44 pages through the complaint before coming to the first cause of action and, upon reaching the first cause of action, one encounters case citations, legal argument, legal conclusions, factual conclusions and irrelevant statements, all in a jumble.

Much of the practice of law and certainly much of legal pleading is a matter of style. Some pleaders favor the Hemingway style, with short, concise sentences; others prefer the stream of consciousness of Joyce or the paragraph-long sentences of Faulkner. However, the third amended complaint does not present a question of literary style. The imposition of

sanctions here was based on transgression going beyond matters of style and form; the court essentially found the pleadings to be frivolous and unnecessarily burdensome.

Judge Broadman also pointed to the form of the application for leave to file late papers as an example of th delaying and bad faith tactics used by Hoar throughout the case. It was hardly the fact that he applied for an extension of time but rather it was the tedious, extraneous, unnecessary, time-consuming minutia with which Hoar inundated the court and the other parties that led the court to conclude that sanctions were appropriate.

Regarding case citations used by Hoar to defend against the demurrers, Hoar argues that he did not miscite cases to the court. However, before he cited the three cases in question, he had misled the

court in other matter of which the court was well aware. In attempting to decide "whether or not you can essentially tack on the time from the federal cause of action" to the state cause of action, Hoar cited to the court as support for the proposition that such tacking is appropriate under Code of Civil Procedure sections 312 and 355. The court read both Code of Civil procedure sections and found that nether said what Hoar represented, ad neither supported his proposition. Mr. Hoar then cited two cases to the court and the following colloquy occurred:

> "THE COURT: Have you read that case? Are [you] representing to me those two cases are directly on point?
>
> "MR. HOAR: That's what I picked up.
>
> "THE COURT: My question to you, sir, is because you just represented two cases [sic] to me that are factually incorrect, I am going to take you on this. If you were wrong and this bears out hat you said is wrong, I am not

going to be happy about it, so I am going to take a recess and read them.

"Before you tell me they stand for the proposition that this tacks on to federal time for period of statute of limitation problems, you best be sure.

"MR. HOAR: As I recall, sir, I got it from Cal Juror [sic]. This is where I recall I got it from.

"THE COURT: Do you want to take a recess and I'll read those two during this time? You tell me what to read and I"ll read it, but I don't not want to find anything.

"What cases do you want me to read?

". . . . . .

"THE COURT: If you just cited to me a case that has been overturned or a case that you have given me an old citation that has been reversed, I'm not going to be happy at all, Mr. Hoar.

"MR. HOAR: That's where I believe I got it.

"THE COURT: I don't carte where you got it, but you have a duty to tell the Court the truth.

"MR. HOAR: These are the best I an do.

> THE COURT: Your best includes giving the judge the right citations. I will not tell you how to practice law, but I don't want people coming in here on a massive case and telling me two code sections and say what you think you say and they don't."

The court then took a recess and returned to note that the cases were aberrant and not applicable at all. The court then chided Mr. Hoar. "[Y]ou went for a doctrine, a doctrine you found in Cal Juror [sic]. You copy down the doctrine, but the doctrine does not apply. You indicate these facts. It's a great doctrine, but I can't extend it. I'm not about t extend it. I'm just a trial judge. I'm not going to do that and not to warn me about the fact that this doctrine has never been extended in this kind of situation is bothersome to the court." The colloquy continued.

> "MR. HOAR: I apologize, Your Honor. I got it as I said from and I believed that it was the

source and I was rushing very hard last February when I put this together.

"THE COURT: Maybe I am old fashioned[ed] or maybe it's my educational background or maybe I am just odd, but it seems to me that when you tell the judge the case stands for a proposition, you have to at least read the cas\e.

"MR. HOAR: I believed that was the source when I obtained it, Your Honor.

"THE COURT: I had heard -- you told me that you read it in Cal Juror [sic]. I didn't have time nor the inclination to look it up, this Cal Juror [sic]. But, I think it's incumbent upon an attorney when they come in to Court and cite three cases not in an area that's determinative of this issue rather than just take it out of the Cal Juror [sic] to look it up, and I don't think you did that.

"MR. HOAR: I apologize to the Court, Your Honor."

Thus, at a minimum Mr. Hoar cited two statutes to the court that were inapplicable, cited three cases that the judge concluded were inapplicable, and admitted to the court that he had not read the

cases and indeed went so far as to apologize to the court for his actions. Yet, he now argues there was no irregularity. Such a position cannot be accepted.

Under the facts appearing in this case and in this record, and after a review of the plaintiff's third amended complaint and he transcript of the hearing on the demurrer to the third amended complaint, we cannot say that the court abused its broad discretion when it imposed sanctions.

DISPOSITION

The judgment of dismissal and order imposing sanctions are affirmed. Respondents are awarded costs on appeal.

/s/_____
Vartabedian, J.

WE CONCUR;

_____
Martin, Acting P.J.

_____
Buckley, J.

S. L. KABOT #49882
McCORMICK, KABOT, MICHNER & FOLEY
A Partnership of Law Corporations
1220 West Main Street
Visalia, CA., 93291
(209) 734-6729

Attorneys for Defendants, City of Visalia, The Redevelopment Agency of the City of Visalia, Gregory F. Collins, Alan T. McIntosh, Mary Louise Vivier, Bob McClain, Don Sharp, Berkley Johnson, Tim Hansen, the Visalia Building Authority, Jeffrey M. Oderman, Ski Harrison and Rutan and Tucker.

FILED
Tulare County
Nov 20 1990
Clerk
By _____Deputy

IN THE SUPERIOR COURT OF THE

STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF TULARE

ROY J. KENDALL, Plaintiff, v. CITY OF VISALIA, et al., Defendants.	Case No. 139050 ORDER SUSTAINING DEMURRER OF DEFENDANTS CITY OF VISALIA, THE REDEVELOPMENT AGENCY OF THE CITY OF VISALIA, GREGORY F. COLLINS, ALAN T. McINTOSH, MARY LOUISE VIVIER, BOB McCLAIN, DON SHARP, BERKLEY JOHNSON, TIM HANSEN, THE VISALIA BUILDING AUTHORITY, JEFFREY M. ODERMAN,

) SKI HARRISON and
) RUTAN and TUCKER TO
) PLAINTIFF'S THIRD
) AMENDED COMPLAINT
) AND ORDER GRANTING
) SANCTIONS AGAINST
) LEONARD C. HOAR,
) JR.
)

The hearing on the demurrer filed by Defendant CITY OF VISALIA, THE REDEVELOPMENT AGENCY OF THE CITY OF VISALIA, GREGORY F. COLLINS, ALAN T. McINTOSH, MARY LOUISE VIVIER, BOB McCLAIN, DON SHARP, BERKLEY JOHNSON, TIM HANSEN, THE VISALIA BUILDING AUTHORITY, JEFFREY M. ODERMAN, SKI HARRISON and RUTAN & TUCKER (hereinafter referred to as "Public Defendants" said Public Defendants' motion to strike portions of said complaint and said Public Defendants' motion for the imposition of sanctions, came on for hearing before the undersigned on August 23, 1990. Said demurrer was heard concurrently with the demurrer filed by Defendants JOSEPH J.

BLAKE & ASSOCIATES, INC., BRAD PAUL and LINDA J. HAYS (hereinafter referred to as "Appraisers"). Public defendants appeared by and through their counsel, McCormick, Kabot, Michner & Foley, and S. L. Kabot, and Defendant Appraisers appeared by and through their counsel McCormick, Barstow, Sheppard, Wayte & Carruth, and Gordon M. Park, and Plaintiff ROY KENDALL, appeared by and through his counsel, Leonard C. Hoar, Jr.

The Court having reviewed the papers and records on file concerning these matters, and after hearing extensive oral argument and the matter having been submitted,

IT IS HEREBY ORDERED:

1. That the general demurrer by Public Defendants, on the grounds that no cause of action has been stated and the special demurrer on the grounds that the complaint was filed after the running of

the sixty day statute of limitations applicable pursuant to Civil Code Section 860 et seq. be sustained without leave to amend as to Plaintiff's First, Second, Fourth and Ninth Causes of Action with regard to these Public Defendants; and

2. That the general demurrer by Public Defendants on the grounds that no cause of action has been stated and the special demurrer on the ground that the Court has no authority in a civil proceeding to remove a public official from office be sustained without leave to amend, as to Plaintiff's Third Cause of action; and

3. That the general demurrer by Public Defendants, that no cause of action has been stated and the special demurrer on the grounds that Plaintiff has failed to, and cannot not now, comply with the Government Tort Claims Act, be sustained

without leave to amend as to Plaintiff's Fifth and Tenth Causes of Action with regard to these Public Defendants; and

4. That the Court has noted that Plaintiff's attorney, Leonard Hoar, has submitted on the record that it would be appropriate to sustain the demurrer without leave to amend as to Plaintiff's Eighth Cause of Action on the grounds that no cause of action was stated against these Public Defendants; and

5. That the Court has noted that Plaintiff's attorney, Leonard Hoard, has admitted on the record that it would be appropriate to sustain the demurrer without leave to amend as to the Sixth Cause of Action on the grounds that no cause of actin was stated against Public Defendants Tim Hansen, The Visalia Public Building Authority, Jeffrey M. Oderman, Ski Harrison and Rutan & Tucker, and that the general demurrers on the ground that

no cause of action has been stated on the special demurrer on the grounds that the applicable one year statute of limitations to file a civil rights action had run before Plaintiff filed the within complaint, is sustained without leave to amend as to Plaintiff's Sixth Cause of Action with regard to Public Defendants City of Visalia, the Redevelopment Agency of the City of Visalia, Gregory F. Collins, Alan T. McIntosh, Mary Louise Vivier, Bob McClain, Don Sharp and Berkley Johnson; and

6. These Public Defendants demurrer to Plaintiff's Seventh Cause of Action is sustained on the grounds of uncertainty and Plaintiff is given leave to file another Amended Complaint to provide sufficient charging allegations and facts as against these Public Defendants to raise a RICO cause of action based upon alleged

mail fraud only, to allow said Defendants to prepare responsive pleadings to said allegations; and

7. Plaintiff is given ninety days within which to file an Amended Complaint to cure the uncertainty in the Seventh Cause of Action as against these Public Defendants with said Amended Complaint to be filed on or before November 23, 1990; and

8. These Public Defendants' motion to strike is granted and Plaintiff is directed to delete said objectionable language referred to in Public Defendants' motion to strike from Plaintiff's anticipated Fourth Amended Complaint; and

9. Sanctions, in the amount of $7,500 are awarded to these Public Defendants and imposed against Plaintiff's legal counsel, Leonard C. Hoar, Jr., pursuant to Code of

Civil procedure Section 128.5 based upon the following circumstances and/or conduct of Mr. Hoar:

(1) That Mr. Hoar was aware of the ruling by the Honorable Judge John Moran, dated December 4, 1989, regarding these Public Defendants' demurrer to Plaintiff's First Amended Complaint, that future complaints could not attack the validity of a certain Lease and/or Guarantee Agreement, and that despite being aware of this prior ruling, Mr. Hoar prepared and filed a Second Amended Complaint and a Third Amended Complaint continuing to attempt to challenge the validity of said Agreements;

(b) That Mr. Hoar was directed by the Honorable Judge John Moran on February 28, 1990, in ruling upon these Public Defendants' demurrer to Plaintiff's Second Amended Complaint, to prepare and file a Third Amended Complaint which organized

legal theories and pled ultimate facts in support of said theories, and that thereafter, Mr. Hoar filed a Third Amended Complaint which totally and completely failed to meet the directions and requirements of said ruling;

(c) The Third Amended Complaint prepared and filed by Mr. Hoar is replete with improper, immaterial and irrelevant matter and often totally superfluous material;

(d) On several occasions in his Points and Authorities, Mr. Hoar cited statutes and cases which he personally failed to read and review which proved not to stand for the legal propositions and arguments put forward by Mr. Hoar;

(e) These actions when taken individually and as a whole, reveal that Mr. Hoar's actions and pleadings in many instances in this case have been done

frivolously, with bad faith, and solely with the purpose of delay, thereby causing undue expense to these Public Defendants.

APPROVED AS TO FORM.

_____
LEONARD C. HOAR

APPROVED AS TO FORM.

/s/ Gordon M. Park
GORDON M. PARK

DATED: 11/19, 1980.

/s/ Howard R. Broadman
THE HONORABLE HOWARD BROADMAN,
Judge of the Superior Court

SUMMARY OF THE ORDER OF THE HONORABLE JOHN P. MORAN, filed January 17, 1991.

This Order was identical to that signed by the Honorable Howard Broadman on November 20, 1992, **except** that paragraph 8 granting the motion to strike was deleted and there was no approval as to form by other counsel.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF TULARE

ROY J. KENDALL, Plaintiff, v. CITY OF VISALIA, et al, Defendants.	Visalia, CA Aug23,1990 No. 139050 Dept: No.7 Judge: HOWARD R. BROADMAN Clerk: Olivia Infante Bailiff: James D. Lacy Reptr: Andrea Walter

Counsel for Plaintiff(s) Leonard Herr

Counsel for Defendant(s) Gordon Park
Stephen Kabot

Nat. of Proceedings: DEFENDANT'S DEMURRER TO PLAINTIFF'S THIRD AMENDED COMPLAINT AND MOTION TO STRIKE PORTIONS OF SAID COMPLAINT; DEFENDANT'S DEMURRER

As to Ct. #8, matter is sustained as to appearing defendant.
As to Ct. #4, sustained as to Mr. Park's clients.

Arguments by counsel.

Demurrer as to Ct. #6, sustained with leave just as to those served.

As to #7 demurrer sustained with leave to amend s to Mr. Park's clients.

As to #5 & #10, sustained with leave to amend as to Mr. Parks clients, ninety days to amend.

Sustain demurrer as to first cause of action without leave to amend and finds section based on 860 not 526A therefore sixty day limitation is applicable.

As to second cause of action sustain demurrer without leave to amend.
As to third cause of action demurrer is sustained without leave to amend.
As to fourth cause of action sustained without leave to amend.
As to fifth and tenth cause of action demurrer is sustained without leave to amend.
As to seventh cause of action sustained with leave to amend, ninety days from this date.
As to ninth cause of action sustained without leave to amend.
As to sixth cause of action sustained without leave to amend.

Comments re sanctions.

ORDER: Motion for sanctions is granted. (Comments by the court).

Court's exhibit #1 Reporter's transcript of 2/28/90, marked for identification.

ORDER: Sanctions in the amount of $7500.00 to go to the city directly, personally against Mr. Herr.

Mr. Kabot to prepare order in conformity with court's order and submit to Mr. Herr for approval.

/s/Olivia Infante
Clerk

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF TULARE
HONORABLE JOHN P. MORAN, JUDGE
DEPARTMENT 7

ROY J. KENDALL,
Plaintiff,
vs.
CITY OF VISALIA, ET AL,
Defendants.

No. 1139050
Court's Ruling

Visalia, California February 28, 1990

REPORTER'S TRANSCRIPT

APPEARANCES:

For the Plaintiff: LEONARD HERR
Attorney at Law
Hanford, California

For the Defendants: STEPHEN KABOT,
Attorney at Law
Visalia, Ca. 93291

CERTIFIED COPY

STACY B. SHAW, C.S.R.
#6139

February 28, 1990 Visalia, California

8:30 a.m.

-oOo-

(Whereupon, the following:

proceedings were had in open court, to wit:)

THE COURT: Kendal versus City of Visalia.

MR. KABOT: Ready, your Honor.

MR. HERR: Ready, your Honor.

Leonard Herr appearing on behalf of Roy and Joy Kendal.

MR. KABOT: Steve Kabot appearing on behalf of the city agency, several of the named defendants, your Honor.

THE COURT: All right.

All right, Mr. Herr, prior to proceeding I have reviewed the points and authorities in this matter, and, particularly, your remarks that you did not have adequate time to prepare the first amended complaint to this matter. That you asked counsel for an extension of time. And it was not extended to you.

MR. HERR: That is correct, your Honor.

THE COURT: I have reviewed the first amended Complaint. It, in my view, it is confusing as far as your theories, and a statement of the required facts to support these theories.

If you wish, I will grant you leave to file a -- to redo this Complaint. And I'll give you the time you're required to do it.

The reason I say this is, I'm not inclined to grant any leave to amend the Complaint after I rule on this demurrer.

So, I think you should have an opportunity to plead your theories as completely, and as effectively as you can. How do you feel about that?

MR. HERR: Well, if you're not inclined to grant leave to amend, your Honor, I would certainly want to do that.

THE COURT: All right.

Why don't we do this, why don't I grant you leave to amend your Complaint? Give you 60 days to do it.

MR. HERR: That would be very helpful, your Honor.

THE COURT: And I -- I suggest you try to organize your theories and plead in ultimate facts there to support those theories, because that's what I look for when I analysis your Complaint; do you understand that?

MR. HERR: Yes, sir.

THE COURT: Okay.

Do you have any comments, Mr. Kabot?

MR. KABOT: Well, m y obvious initial comment would be, to oppose that, your Honor. But, I'm not going to under the circumstances.

I would ask the Court to clarify its earlier order, perhaps. Since, Mr. Herr in his moving papers seems to inter-

pret your earlier decision on the demurrer of the first amended Complaint somewhat differently that I read it.

Will -- will he be allowed to plead any Cause of Action based upon an attack on the validity of the guarantee?

THE COURT: He can plead anything he wants, as far as I'm concerned.

MR. KABOT: All right.

THE COURT: I have previously ruled that Causes of Action that go to the validity of the -- of the --

MR KABOT: Lease and guarantee.

THE COURT: Lease, and a what?

MR. KABOT: Guarantee.

THE COURT: Guarantee, that those appear, appear to be barred by the statute of limitations set forth in the Code of Civil Procedure.

I notice from your Complaint and points and authorities that you argue that the allegations you pleaded in your first amended Complaint state a theory which is not barred by that.

I mean, if you wish to do that, go ahead.

MR. HERR: Yes, your Honor.

THE COURT: And, particularly, since this is the first time that the plaintiff has appeared by counsel in this matter.

But my view is, when I review this Complaint, and if the defendant demurrers, I think, that the plaintiff has been given an adequate opportunity to plead any Cases of Action that the plaintiff has.

And, again, I'm not going to be inclined to grant further leave to amend in this matter. I'm going to analyze the Complaint. And I'm gong to rule on any demurrer Cause of Action by Cause of Action, and that's it.

All right.

MR. HERR: Very well, your Honor.

THE COURT: All right.

MR. KABOT: Thank you, your Honor.

MR. HERR: Thank you, your Honor.

THE COURT: All right.

Do you waive notice of any further notice of my ruling in this matter?

MR. HERR: Yes.

THE COURT: So the 60 days will commence to run from now.

MR. HERR: Yes.

MR. KABOT: Yes, your HONOR>

THE COURT: All right. Thank you.

(Whereupon, the proceedings were concluded.)

-oOo-

FILED
TULARE COUNTY
Nov 6 1990
Clerk
By _____Deputy

FILED
Nov 9 2 11 PM '90
Ernest J. Maggini
Monterey County Clerk
_____Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF MONTEREY

ROY J. KENDALL, A of the City of Visalia,

Plaintiff,

v.

CITY OF VISALIA, A Charter City of the State of California et al.,

Defendants.

Case No. 139050

DECISION

This matter having been assigned to this Court for ruling on challenge pursuant to Section 170.3 CCP. This Court hereby rules as follows:

Most of the evidence submitted by the plaintiff constitutes inadmissible hearsay. What is substantiated is that the defendant Diana Dooley's public relations firm was employed by Judge Broadman during

his reelection campaign for Municipal Court in 1988. The firm received over $11,000.00 for its services and, at least for some purposes had the same mailing address as the Judge's reelection committee.

Even though we are dealing with purely legal matters rather than factual determination, this Court concludes that based on this fairly recent relationship, a reasonable person viewing all the circumstances at the present time might entertain a doubt as to Judge Broadman's ability to be impartial. (CCP Section 170.1 (a)(6)(c)).

Plaintiff's motion to disqualify Judge Broadman pursuant to CCP Section 170.3 is granted, prospectively only. There is no legal basis for rendering this disqualification retroactive. The disqualification shall apply therefore to any

future hearings in the matter, but not as to any matters already ruled on by Judge Broadman.

All papers and documents supplied to this Court for its ruling are being returned along with this ruling to the Tulare County Superior Court.

Dated: Nov 9, 1990

/s/ John H. Phillips
JOHN H. PHILLIPS
JUDGE OF THE SUPERIOR COURT

(SEAL, SUPERIOR COURT)
(MONTEREY COUNTY)

I certify that the foregoing document is a true copy of the original on file in my office.
Dated: Nov 9 1990
Ernest A. Maggini, Clerk
By:_____, Deputy

FILED
TULARE COUNTY
FEB 20 1991
NADINE SVOBODA, CLERK
BY: _____

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF TULARE

ROY J. KENDALL, a Taxpayer of the City of Visalia, Plaintiff, vs. CITY OF VISALIA, A Charter City of the State of California, et al, Defendants.	No. 139050 Recusal of Judge John P. Moran

Aline M. Moran, the wife of Judge John P. Moran, is a partner in the Hein Ranch Company which leases land to Lonestar aggregates for the extraction of aggregates. Such aggregates, together with aggregates extracted from other properties leased by Lonestar, are processed to sand and gravel at its Lemon Cove plant. Attached to Attorney Hoar's Statement are copies of four

Daily Ticket Reports reporting sales of sand and gravel for use in the construction of the Radisson Hotel. This material is not identified to aggregates from the Hein Ranch Company land, and Lonestar does not keep records identifying products sold to a particular source. The gist of the situation here is that sand and gravel used in the construction of the Radisson Hotel was purchased from a plant which purchases some of its aggregates from the Hein Ranch Company. Neither Judge Moran nor his wife have ever had an interest in Lonestar.

Although the focus of this litigation has changed since its inception, it is essentially an action against the City of Visalia and City officials challenging the legality of the City's financial involvement in the construction of the now completed Radisson Hotel. The litigation does no relate to future projects which

might be undertaken by the City. The outcome of this litigation will have no specific financial effect on the Hein Ranch Company; and its interest in any future projects would be remote and contingent.

The Court had no knowledge that any material from the Lemon Cove plant was used in the construction of the Radisson Hotel when it ruled on any matters in this proceeding. Had it known of such circumstances it would have notified counsel prior to acting further in the matter.

Notwithstanding the foregoing, and giving due consideration to the Publicity this litigation has received in the community and the ugly turn it has recently taken, including Hoar's accusation of financial interest on the part of the Court, and the Court having no desire to have further contact with either Hoar or his case, the Court finds that it would be

in the interest of justice to recuse itself pursuant to Code of Civil Procedure Section 170.3(a)(6)(A).

The Court recuses itself in this matter.

Dated: February 15, 1991

/s/ John P. Moran
JOHN P. MORAN
Judge of the Superior Court

FEDERAL ISSUES RAISED IN STATE COURTS BELOW

1. **Plaintiff's Objections and Opposition to Motion To Strike and Demurrer and Memorandum of Points and Authorities in Support Thereof**, Filed February 22, 1990, pp. 43:5 - 45:2: (NOTE: Although the Demurrer Hearing of August 23, 1992, was based upon the Third Amended Complaint, both the Trial Court and the Court of Appeal ruled upon both the Second and Third Amended Complaints.)

J. **REQUEST FOR MONETARY SANCTIONS AGAINST PLAINTIFF AND HIS LEGAL COUNSEL.**

1. Each citizen, including plaintiff and counsel, are entitled to the constitutionally guaranteed right to petition the government for the redress of legitimate grievances. (**United States Constitution, 1st Amendment; California Constitution**, Article I, Section 3.)

2. The United States Supreme Court has held that the right to petition protects the freedom to seek redress from all three of the coordinate branches of government. **Eastern R. Conf. v. Noerr Motors** (1961) 365 U.S. 127, 81 S.Ct. 523,

5 L.Ed.2d 464; **Mine Workers v. Pennington** (1965) 381 U.S. 657, 669-672, 85 S.Ct. 1585, 1592-1594, 14 L.Ed.2d 626, which together made up the **Noerr-Pennington** doctrine.

3. "Certainly the right to petition extends to all departments of the Government. The right of access to the courts is but one aspect of the right of petition." **California Transport v. Trucking Unlimited** (1972) 404 U.S. 508, 510, 92 S.Ct. 609 ,611, 30 L.Ed.2d 642.

4. The original California Constitution Article I, Section 10, enacted in 1949, stated: "The people shall have the right . . . to petition the Legislature for redress of grievances." On November 5, 1974, the voters adopted the amended and renumbered **California Constitution**, Article I, Section 3, which gives the people the right to petition

government for redress of grievances, clearly a broadening of the right of petition.

5. Criticism of government is absolutely privileged. **City of Albany v. Meyers** (1929) 99 Cal.App. 651, 279 P. 213.

6. The right of petition protects attempts to obtain redress through institution of judicial proceedings as well as through importuning executive officials and legislature; right encompasses act of filing lawsuit solely to obtain monetary compensation for individualized wrongs as well as filing suit to draw attention to issues of broader public interest or political significance. **City of Long Beach v. Bozek** (1982) 31 Cal.3d 527, 183 Cal.Rptr. 86, 645 P.2d 137.

7. Plaintiff, with the assistance of counsel, is seeking to address an egregious wrong by defendants against the taxpayers, voters, and citizens of the

City of Visalia. The detail cited in the Second Amended Complaint clearly shows the good faith and seriousness of plaintiff, with the assistance of coun , in bringing this issue before the courts for resolution and justice, since it shall never come from defendants.

8. Defendants' request for sanctions is a blatant attempt at intimidation.

2. **Motion for Reconsideration of Judge Broadman's Order, Filed September 5, 1990**, CT 536 - 639:

VIII

IMPOSITION OF SANCTIONS

23. **Only a General Claim for Sanctions**. Defendant CITY OFFICIALS so sanctions in their general closing

paragraph on lines 3 and 4 of their points and authorities in support of Demurrer and Motion to Strike Third Amended Complaint.

a. Plaintiff has noted that Defendants regularly submit the general, unsubstantiated claim for sanctions as a part of their pleadings, apparently in attempt to intimidate plaintiff. Neither plaintiff nor counsel is intimidated.

b. Defendants have not specified any damages or costs in any amount upon which an award of sanctions to the City can be based.

24. **Arbitrary and Capricious**. In the total absence of any evidence proffered by defendants as to costs and fees, any award of sanctions by the Court to the City is arbitrary and capricious, without any relationship of any legitimate fact known to the Court.

a. The only closely relevant fact upon which the Court could possibly base the $7,500 award of sanctions to the City is the fact that plaintiff has requested requested documented sanctions for failure to produce documents for discovery in an approximately similar amount.

25. **Code Provisions**. None of the conduct attributable by the Court to plaintiff's counsel is commensurate with the provisions of **Code of Civil Procedure** Section 128.5. The Court found the pleading frivolous. Section 128.5(b)(2) defines "Frivolous" as meaning (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party. Neither definition is applicable to the complaint prepared by Leonard C. Hoar, Jr.

a. The complaint has merit; it charges public officials with illegally giving, loaning, and pledging public funds

in violation of **California Constitution** Article XVI, Section 6. Full charges and specifications are provided to leave no doubt as that of which defendants are accused. The sums of money involved are not trivial.

b. The complaint is not intended to harass or delay at all. It is intended to be complete and thorough, and to plead theories as completely and effectively as counsel was able, as suggested by Judge Moran (Exhibit "A", 2: 8-11)

c. The mere fact that the Court does not like counsel's style, nor his innovations, nor his efforts to make the complaint clearer, more precise, and more informative, is not a ground for sanctions. Sanctions for style are arbitrary and capricious, and violate fundamental standards of due process under the 14th

Amendment of the **Constitution of the United States** and Article I, Section 7 of the **California Constitution**.

26. **PROTECTED CONDUCT**. Each citizen, including plaintiff and counsel, are entitled to the constitutionally guaranteed right to petition the government fore the redress of legitimate grievances. **Constitution of the United States, First Amendment; california constitution**, Article I, Section 3.

a. The United States Supreme Court has held that the right to petition protects the freedom to seek redress from all three of the coordinate branches of government. **Eastern R. Conf. v. Noerr Motors** (1961) 365 U.S. 127, 81 S Ct 523, 5 L Ed 2d 464; **Mine Workers v. Pennington** (1965) 381 US 657, 669-672, 85 S Ct 1585, 1592-1594, 14 L Ed 2d 626, which together made up the **Noerr-Pennington** doctrine.

b. "Certainly the right to petition extends to all departments of the Government. The right of access to the courts is but one aspect of the right of petition." **California Transport v. Trucking Unlimited** (1972) 404 US 508, 510 92 S Ct 609, 611, 30 L Ed 2d 642.

c. The original California Constitution Article I, Section 10, enacted in 1949, stated: "The people shall have the right . . . to petition the Legislature for redress of grievances." ON November 5, 1974, the voters adopted the amended and renumbered **California Constitution**, Article I, Section 3, which gives the people the right to petition government for redress of grievances, clearly a broadening of the right to petition.

d. Criticism of government is absolutely privileged. **City of Albany v. Meyers** (1929) 99 Cal App 651, 179 P 213.

e. The right of petition protects attempts to obtain redress through institution of judicial proceedings as well as through importuning executive officials and legislature; right encompasses act of filing lawsuit solely to obtain monetary compensation for individualized wrongs as well as filing suit to draw attention to issues of broader public interest or political significance. **City of Long Beach v. Bozek** (1982) 31 Cal.3d 527, 183 Cal Rptr 86, 645 P2d 137, vacated, 459 US 1095, 74 L Ed 2d 943, and remanded; reaffirmed 33 Cal3d 727, 1909 Cal Rptr 918, 661 P2d 1072.

f. Plaintiff, with the assistance of counsel, is seeking to address an egregious wrong by defendant City officials against the taxpayers, voters, and residents of the City of Visalia. The detailed charges and specifications clearly shows the good faith and serious-

ness of plaintiff and counsel in bringing this issue before the court for resolution and justice, since is shall never come from the defendant CITY OFFICIALS.

g. Sanctioning counsel places a chill on plaintiff's exercise of his First Amendment Rights. If counsel are sanctioned for being detailed in charges and specifications, that fact in turn shall discourage other counsel from entering this thorny thicket of local politics.

3. **Judge Broadman's Ruling of December 5, 1990**: (Ct 830)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF TULARE
Visalia, California December 5, 1990

ROY J. KENDALL, Plaintiff, v.
) No. 139050 Dept. No. 7
) Judge, Honorable Howard Broadman
) Clerk Olivia Infante
) Bailiff _____
) Reporter _____

City of Visalia,)
)
Defendant.)
_____)

Nature of Hearing: RULING ON SUBMITTED MATTER

The Court having taken matter under submission now makes no ruling pursuant to Judge John M. Phillip's order.

All previous orders to remain in effect.

/s/ Olivia Infante
Clerk

4. **Plaintiff and Appellants' Opening Brief on Appeal**, pp. 45:2 - 47:5:

D. **First Amendment Protected Conduct.** Each citizen, including plaintiff and counsel, are entitled to the constitutionally guaranteed right to petition the government fore the redress of legitimate grievances. **Constitution of the United States, First Amendment; California Constitution**, Article I, Section 3.

1. The Noerr-Pennington Doctrine. The United States Supreme Court has held that the right to petition protects the

freedom to seek redress from all three of the coordinate branches of government. **Eastern R. Conf. v. Noerr Motors** (1961) 365 U.S. 127, 81 S Ct 523, 5 L Ed 2d 464; **Mine Workers v. Pennington** (1965) 381 US 657, 669-672, 85 S Ct 1585, 1592-1594, 14 L Ed 2d 626, which together made up the **Noerr-Pennington** doctrine.

2. Petition Includes Court Access. "Certainly the right to petition extends to all departments of the Government. The right of access to the courts is but one aspect of the right of petition." **California Transport v. Trucking Unlimited** (1972) 404 US 508, 510 92 S Ct 609, 611, 30 L Ed 2d 642.

3. Right to Petition Broadened in 1974. The original California Constitution Article I, Section 10, enacted in 1949, stated: "The people shall have the right . . . to petition the Legislature for redress of grievances." On November

5, 1974, the voters adopted the amended and renumbered California Constitution, Article I, Section 3, which gives the people the right to petition government for redress of grievances, clearly a broadening of the right to petition.

[inadvertent printer deletion in opening brief] . . government is absolutely privileged. City of Albany v. Meyers (1929) 99 Cal App 651, 179 P 213.

5. Suit Against Government Privileged. The right of petition protects attempts to obtain redress through institution of judicial proceedings as well as through importuning executive officials and legislature; right encompasses act of filing lawsuit solely to obtain monetary compensation for individualized wrongs as well as filing suit to draw attention to issues of broader public interest or political significance. City of Long Beach v. Bozek (1982) 31

Cal.3d 527, 183 Cal Rptr 86, 645 P2d 137, vacated, 459 US 1095, 74 L Ed 2d 943, and remanded; reaffirmed 33 Cal3d 727, 1909 Cal Rptr 918, 661 P2d 1072.

6. Egregious Wrongs Require Judicial Relief. Plaintiff, with the assistance of counsel, is seeking to address an egregious wrong by defendant City officials against the taxpayers, voters, and residents of the City of Visalia. The detailed charges and specifications clearly shows the good faith and seriousness of plaintiff and counsel in bringing this issue before the court for resolution and justice, since is shall never come from the defendant CITY OFFICIALS.

7. Sanctions A Chilling Effect on First Amendment Rights. Sanctioning counsel places a chill on plaintiff's exercise of his First Amendment Rights. If counsel are sanctioned for being detailed in charges and specifications, that fact in

turn shall discourage other counsel from entering this thorny thicket of local politics -- and all too few are even willing to look at this type of case to begin with, let alone undertake it.

5. **Petition for Hearing Before California Supreme Court**, 28:13 - 29:24.

VIII

IMPOSITION OF SANCTIONS

23. **Only a General Claim for Sanctions**. Defendant CITY OFFICIALS sought sanctions in their general closing paragraph on lines 3 and 4 of their points and authorities in support of Demurrer and Motion to Strike Third Amended Complaint.

a. Plaintiff has noted that Defendants regularly submit the general, unsubstantiated claim for sanctions as a

part of their pleadings, apparently in attempt to intimidate plaintiff. Neither plaintiff nor counsel is intimidated.

b. Defendants have not specified any damages or costs in any amount upon which an award of sanctions to the City can be based.

24. **Arbitrary and Capricious**. In the total absence of any evidence proffered by defendants as to costs and fees, any award of sanctions by the Court to the City is arbitrary and capricious, without any relationship of any legitimate fact known to the Court.

a. The only closely relevant fact upon which the Court could possibly base the $7,500 award of sanctions to the City is the fact that plaintiff has requested requested documented sanctions for failure to produce documents for discovery in an approximately similar amount.

25. **Code Provisions**. None of the conduct attributable by the Court to plaintiff's counsel is commensurate with the provisions of **Code of Civil Procedure** Section 128.5. The Court found the pleading frivolous. Section 128.5(b)(2) defines "Frivolous" as meaning (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party. Neither definition is applicable to the complaint prepared by Leonard C. Hoar, Jr.

a. The complaint has merit; it charges public officials with illegally giving, loaning, and pledging public funds in violation of **California Constitution** Article XVI, Section 6. Full charges and specifications are provided to leave no doubt as that of which defendants are accused. The sums of money involved are not trivial.

b. The complaint is not intended to harass or delay at all. It is intended to be complete and thorough, and to plead theories as completely and effectively as counsel was able, as suggested by Judge Moran (Exhibit "A", 2: 8-11)

c. The mere fact that the Court does not like counsel's style, nor his innovations, nor his efforts to make the complaint clearer, more precise, and more informative, is not a ground for sanctions. Sanctions for style are arbitrary and capricious, and violate fundamental standards of due process under the 14th Amendment of the **Constitution of the United States** and Article I, Section 7 of the **California Constitution**.

26. **PROTECTED CONDUCT**. Each citizen, including plaintiff and counsel, are entitled to the constitutionally guaranteed right to petition the government for the redress of legitimate grievances. **Con-**

stitution of the United States, First Amendment; California Constitution, Article I, Section 3.

a. The United States Supreme Court has held that the right to petition protects the freedom to seek redress from all three of the coordinate branches of government. **Eastern R. Conf. v. Noerr Motors** (1961) 365 U.S. 127, 81 S Ct 523, 5 L Ed 2d 464; **Mine Workers v. Pennington** (1965) 381 US 657, 669-672, 85 S Ct 1585, 1592-1594, 14 L Ed 2d 626, which together made up the **Noerr-Pennington** doctrine.

b. "Certainly the right to petition extends to all departments of the Government. The right of access to the courts is but one aspect of the right of petition." **California Transport v. Trucking Unlimited** (1972) 404 US 508, 510 92 S Ct 609, 611, 30 L Ed 2d 642.

c. The original California Constitution Article I, Section 10, enacted in 1949, stated: "The people shall have the right . . . to petition the Legislature for redress of grievances." On November 5, 1974, the voters adopted the amended and renumbered **California Constitution**, Article I, Section 3, which gives the people the right to petition government for redress of grievances, clearly a broadening of the right to petition.

d. Criticism of government is absolutely privileged. **City of Albany v. Meyers** (1929) 99 Cal App 651, 179 P 213.

e. The right of petition protects attempts to obtain redress through institution of judicial proceedings as well as through importuning executive officials and legislature; right encompasses act of filing lawsuit solely to obtain monetary compensation for individualized wrongs as

well as filing suit to draw attention to issues of broader public interest or political significance. **City of Long Beach v. Bozek** (1982) 31 Cal.3d 527, 183 Cal Rptr 86, 645 P2d 137, vacated, 459 US 1095, 74 L Ed 2d 943, and remanded; reaffirmed 33 Cal3d 727, 1909 Cal Rptr 918, 661 P2d 1072.

f. Plaintiff, with the assistance of counsel, is seeking to address an egregious wrong by defendant City officials against the taxpayers, voters, and residents of the City of Visalia. The detailed charges and specifications clearly shows the good faith and seriousness of plaintiff and counsel in bringing this issue before the court for resolution and justice, since is shall never come from the defendant CITY OFFICIALS.

g. Sanctioning counsel places a chill on plaintiff's exercise of his First Amendment Rights. If counsel are sanc-

tioned for being detailed in charges and specifications, that fact in turn shall discourage other counsel from entering this thorny thicket of local politics.

ARTICLE VI

Legislative. The Council.

Powers and Duties

Section 6. Ordinance: The enacting clause of every ordinance passed by the Council shall be: "Be it ordained by the Council of the City of Visalia." The enacting clause of every ordinance initiated by the people shall be; "Be it ordained by the people of the City of Visalia." At least five days must elapse between the introduction and the final passage of any ordinance; provided, that amendments germane to the subject of any proposed ordinance may be made when it is brought up for final passage; and provided further, that in case of an extraordinary epidemic or any disaster, such as flood, fire, or earthquake requiring immediate action on the part of any public

authority, an emergency ordinance may be introduced and passed at either a regular or special meeting without any intervention of time between introduction and final passage. A final vote on any ordinance or any vote on any appropriation must be taken only at a regular or adjourned regular meeting. Every ordinance must be signed by the Mayor, attested by the Clerk and the ordinance or a brief summary thereof published once in the official newspaper. Any ordinance granting any franchise or privilege shall be published at the expense of the applicant therefor.

Section 7. When Ordinances go into Effect; Except as otherwise provided in this Charter every ordinance, and every measure passed by the Council granting any franchise or privilege, shall go into effect at the expiration of thirty days

after its final passage, unless otherwise provided in said ordinance or measure; provided, however, that no such ordinance or measure shall go into effect less than thirty days from its passage. But ordinances declared by the Council to be necessary as emergency measures for the immediate preservation of the public peace, health, or safety, containing a statement of the reasons for their urgency and passed by a four-fifths vote of the Council, ordinances ordering or otherwise relating to annexations, elections, and ordinances relating to public improvements, the cost of which is to be borne whole or in party by special assessments, may go into effect at the will of the Council.

Section 8. Amending Ordinances: No ordinance shall be amended by reference to its title, but the sections thereof to be

amended, shall be re-enacted at length as amended; and any amendment passed contrary to the provisions of this section shall be void, except the City Council may adopt and amend any standard code of technical regulations by reference thereto without the necessity of publishing s aid ordinances in their entirety; . . .

Section 16. Sale or Lease of City Property: No sale of real estate shall be authorized by the Council except by ordinance passed by the affirmative vote of four-fifths of all the members and no lease shall be made for a period of longer than five years, except by ordinance adopted by the Council.

ARTICLE XIV

Franchises

Section 1. Franchise, renewals, extensions or amendments of franchise may be granted by the City Council whenever, in its opinion, the public necessity or convenience may require any such grant. No such grant shall be exclusive, nor made except by ordinance, nor in violation of any limitation contained in this Charter, nor for a longer term than fifty years. . . . ; provided, that no such ordinance shall be passed as an emergency measure.

ARTICLE XVI

Miscellaneous Provisions

Section 8. No member of the Council or of any board and no officer or employee of the City shall be or become interested in any contract for which bids are or may be required for the furnishing of labor or materials to or for the City, nor shall either or any of them receive any gratuity or advantage from any contract or from the

contractor furnishing any labor or material under any contract, the cost or consideration of which is payable from the City Treasury. Any such contract with the City in which any such officer or employee is or becomes interested shall be declared void by the Council.

Section 13. Every officer who shall wilfully approve, allow or pay any demand on he Treasury, not authorized by law, shall be liable to the City individually and his official bond or the amount of the demand so approved, allowed or paid, and shall forfeit such office and be forever disbarred and disqualified from holding any position in the service of the City.

ORDERS ISSUED IN COMPANION CASE

NOTE: The following orders were issued in the companion case of Leonard C. Hoar, Jr., vs. Butch Coley, Sheriff, Tulare County, California, United States District Court, Eastern District of California, Case No. CV-F 92-5706-REC-P, filed Octoer 22, 1992, a Petition for Writ of Habeas Corpus from Jugment of Conviction for Contempt arising out of the case of **Kendall v. The City of Visalia, et al**, the instant case.

Filed
Oct 22 2 03 PM '92
Clerk, District Court
Eastern District Calif
By_____
Deputy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LEONARD C. HOAR, JR., Petitioner, v. BUTCH COLEY, Sheriff, Tulare County, California Respondent.	No. CV-F-92-5706 REC ORDER DENYING APPLICATION FOR OF CONFINEMENT FOR CONTEMPT PENDING WRIT AND HEARING

At approximately 8:45 a.m., Leonard C. Hoar, Jr., filed a Petition for Writ of Habeas Corpus and Application for Stay of Confinement for Contempt Pending Writ and hearing.

By order issued on October 16, 1992, petitioner was adjudged to be in contempt of court by the Honorable Gerald F. Sevier, Judge of the Tulare County Supe-

rior Court for petitioner's refusal to obey court orders that he be sworn as a judgment debtor with respect to a sanctions in the amount of $7,500.00 imposed against petitioner in Roy J. Kendall v. City of Visalia, et al., Tulare County Superior Court No. 139050, and affirmed on appeal by the Fifth District Court of Appeal by an opinion issued on May 19, 1992, petition for review by the California Supreme Court denied. Petitioner has been ordered to be committed to the Tulare County Jail for a period of five days commencing on October 22, 1992 at 10:00 a.m. and to pay a fine in the amount of $750.00.

Petitioner's application for stay is denied. A court, in deciding whether to issue a stay, must consider:

> 1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would

> substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest.

O'Bryan v. Estelle, 691 F.2d 706, 708 (5th Cir. 1982).

The court has reviewed the Petition for Writ of Habeas Corpus. The court is persuaded that petitioner has made no showing of likelihood of success on the merits. First of all, it appears that the petition contains unexhausted claims. Therefore, the petition most likely will be dismissed. Rose v. Lundy, 455 U.S. 509 (1982); but see Neuschafer v. Whitley, 860 F.2d 1470, 1474 n.1 (9th Cir. 1988), cert. denied, 493 U.S. 906, (1989). Secondly, the court is of the opinion that petitioner's constitutional clams are without substantive merit and verge on frivilous (sic). Although petitioner has shown irreparable injury because he cannot purge himself of this contempt and although the granting of the stay will not

substantially ham other parties, the court is persuaded that the granting of the stay will not serve the public interest because, as noted, the petition appears to the court to be meritless.

ACCORDINGLY, petitioner's Application for Stay of Confinement for Contempt Pending Writ and Hearing is denied.

Dated: October 22, 1992

/s/ Robert E. Coyle
ROBERT E. COYLE
UNITED STATES DISTRICT JUDGE

FILED
Nov 5 2:15 PM '92
Clerk US. District Court
Eastern District, Calif.
By _____
Deputy

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LEONARD C. HOAR, JR., Petitioner, v. BUTCH COLEY, Sheriff, Tulare County, California, Respondent.	No. CV-F-92-5706 REC ORDER TO SHOW CAUSE

Respondent is hereby ordered to respond to the Petition for Writ of Habeas Corpus and show cause why the relief requested therein should not be granted within 30 days of the filing date of this Order to Show Cause. Petitioner's traverse, if any, shall be filed within 15 days thereafter.

Dated: November 5, 1992.

/s/ Robert E. Coyle
UNITED STATES DISTRICT JUDGE

FILED
Nov 16 3 29 PM '92
U.S. Dist. Court
Eastern Dist, Calif.
California

By_____
Deputy

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LEONARD C. HOAR, JR., Petitioner, v. BUTCH COLEY, Sheriff, Tulare County, California Respondent.	No. CV-F-92-5706 REC ORDER DIRECTING SERVICE OF PETITION AND TO SHOW CAUSE

The court has been advised that petitioner has not served respondent with a copy of his Petition for Writ of Habeas Corpus.

Petitioner is hereby directed to accomplish service of the Petition for Writ of Habeas Corpus, the Order Denying Application for Stay of Confinement for Con-

tempt Pending Writ and Hearing, and this Order Directing Service and To Show Cause on respondent within 20 days of the filing date of this order.

Respondent is ordered to respond to the Petition for Writ of Habeas Corpus and show cause why the relief requested therein should not be granted within 30 days of service upon respondent of the petition and other documents ordered herein to be served. Petitioners' traverse, if any, shall be filed within 15 days thereafter.[1]

Dated: November 16, 1992

/s/ Robert E. Coyle
ROBERT E. COYLE
UNITED STATES DISTRICT JUDGE

---

1. The Order to Show Cause filed November 5, 1992 is hereby vacated.

FILED
Tulare County
Aug - 2 1990
Clerk
By _____Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF TULARE

ROY J. KENDALL, Plaintiff, vs. CITY OF VISALIA, a Charter City of the State of California, Redevelopment Agency of the City of Visalia, an Agency created by the laws of the State of California, et al., Defendants.	No. 139050 Order of Reference Re Discovery [C.C.P. 1639(e)]

It appears that the interests of justice and efficiency will best be served in this case by the appointment of a referee for the purpose of hearing and determining a dispute between the parties as to discovery matters in this case and to report and make recommendations to the Court thereon.

It is therefore ordered that the Honorable Jay R. Ballantyne, Justice of the Court of Appeal, retired, is hereby appointed Referee for such purposes.

The Referee shall hear and determine Plaitiff's motion to compel production of documents for inspection and copying and for sanctions filed May 23, 1990 in this matter.

In order to accomplish this reference, the Referee shall have and is hereby granted the following powers:

(a) To set the date, time and place of all hearings.

(b) To recommend the issuance of subpoenas.

(c) To preside over hearings, take evidence and rule on objections and motions.

(d) To order the production of all pertinent writings, records, and documents in possession of any of the parties. The referee, in this regard, is to recommend to the court the imposition of any sanctions for the failure of any party or attorney to comply with such an order to produce or to cooperate with the referee.

(e) To order, supervise, preside over, conduct hearings, rule on objections, and recommend sanctions for any appropriate discovery to accomplish this reference.

The referee shall submit a written report to the Court within thirty (30) days from the completion of this

reference, with copies mailed to each of the parties. The report shall contain the following:

(a) Decisions as to questions submitted.

(b) Recommendations as to the following items:

(1) Amount of the fees and costs of the referee, and any fees of any experts employed to assist the referee that the Court should allow; and

(2) The reallocations of all costs and fees between the parties; and

(3) The imposition of any sanctions against any of the parties and/or attorneys for failure to produce discovery items or to cooperate with the referee in this reference.

Objections to this report may be filed with the Court no later than fifteen (15) days after the referee serves the report or all objections thereto will be deemed waived. Copies of such objections and and response thereto, shall be served upon the referee, who may then file a supplemental report. The Court will then set a hearing

on the matters of objections, fees or sanctions. Such hearing may be waived by the parties in writing, filed with the clerk of the Court; in such event, the Court will determine these matters based on the written objections, any responses, the report and any supplemental report of the referee.

The referee shall receive a fee as agreed to by the parties or if the parties cannot agree, then in a reasonable amount, subject to approval of this Court.

The parties shall pay in advance to the referee, the estimated reasonable fees and costs of the reference, as may be specified in advance by the referee. The parties shall initially share equally by each paying their proportionate amount of the estimated fees and costs of the reference. The costs shall include the costs of a certified shorthand reporter,

if s ordered by the referee. All costs shall be paid within ten (10) days of the billing by the referee.

All costs and fees shall be subject to reallocation as recommended by the referee and as finally determined by the Court.

The Court reserves jurisdiction to make such other and further orders with respect to this reference as may be just and proper, including, but not limited to the allowance of reference fees and costs, a the enforcement thereof.

Dated: August 2, 1990

/s/ John P. Moran
JOHN M. MORAN
Judge of the Superior Court

Supreme Court, U.S.
FILED
MAR 1 1993
OFFICE OF THE CLERK

No. 92-1300

In The

Supreme Court of the United States

October Term, 1992

ROY J. KENDALL, *et al.*,

Petitioners,

v.

THE CITY OF VISALIA, *et al.*,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

RESPONDENTS' BRIEF IN OPPOSITION

S. L. Kabot*
McCormick, Kabot,
Michner & Foley
1220 West Main Street
Visalia, California 93291
(209) 734-6729

M. Katherine Jenson
Rutan & Tucker
611 Anton Boulevard, #1400
Costa Mesa, California 92626
P.O. Box 1950
Costa Mesa, California 92628
(714) 641-5100

*Counsel of Record

Counsel for Respondents

QUESTIONS PRESENTED

1. Whether the California trial court's imposition of sanctions against an attorney pursuant to California Code of Civil Procedure Section 128.5 in a lawsuit involving a challenge to local governmental actions violates the client's rights to petition the government for redress of grievances under the First Amendment to the United States Constitution?

2. Whether Petitioners may raise issues in their petition for writ of certiorari that were not raised in the courts below and are not issues arising from this action?

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California Government Code
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No. 92-1300

In The

Supreme Court of the United States

October Term, 1992

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ROY J. KENDALL, *et al.*,

Petitioners,

v.

THE CITY OF VISALIA, *et al.*,

Respondents

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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RESPONDENTS' BRIEF IN OPPOSITION

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Respondents respectfully request this Court deny Petitioners' petition for a writ of certiorari to review the decision of the California Court of Appeal, Fifth District.

OPINIONS BELOW

The decision of the California Court of Appeal, Fifth Appellate District, was rendered on May 19, 1992, and is not reported. The opinion affirms the judgment of the Superior Court of Tulare County, California, Case No. 139050, filed March 8, 1991, an unreported judgment. Petitioners' request for discretionary review by the California Supreme Court was denied on August 12, 1992.

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JURISDICTION

The jurisdiction of this Court is pursuant to 28 U.S.C. § 1257(3).

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

peaceably to assemble, and to petition the Government for a redress of grievances.

California Code of Civil Procedure Section 128.5 provides in relevant part:

Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.

California Government Code Section 53511 provides in relevant part:

A local agency may bring an action to determine the validity of its bonds, warrants, contracts, obligations or evidences of indebtedness pursuant to Chapter 9 (commencing with Section 860) of . . . the Code of Civil Procedure.

California Code of Civil Procedure Sections 860 and 863 provides in relevant part:

A public agency may upon the existence of any matter which under any other law is authorized to be determined pursuant to this chapter, and for 60 days thereafter, bring an

action in the superior court of the county in which the principal office of the public agency is located to determine the validity of such matter.

. . .

If no proceedings have been brought by the public agency pursuant to this chapter, any interested person may bring an action within the time and in the court specified by Section 860 to determine the validity of such matter.

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STATEMENT OF THE CASE

Petitioners have made it their hobby to sue Respondents over the project which is the subject of this Petition. This action is one of five lawsuits Petitioner Kendall has instituted regarding the hotel project in downtown Visalia, California, which Petitioners philosophically oppose.

This Petition arises from the Tulare County Superior Court's dismissal of an action filed against Respondents City of Visalia ("City"), the Redevelopment Agency of the City of Visalia ("Agency"), the Visalia Public Building Authority, and various City officials after the court sustained Respondents' demurrer to

Petitioner's third amended complaint without leave to amend, and the imposition of sanctions in the amount of $7,500 against counsel Leonard C. Hoar, Jr. (Appendix to Petition for Writ of Certiorari ["Appendix"], pp. 51-61.) That complaint constituted Petitioner Kendall's *fourth* attempt to plead a cause of action challenging the validity of a lease between the City and Visalia Convention Center Hotel, Inc. ("VCCH"), a guarantee agreement entered into by the Agency and Metro North State Bank ("Bank"), and the actions by various City and Agency elected officials and appointed officers related to the lease and guarantee agreement.

On February 1, 1987, the City and VCCH entered into a lease under which the City agreed to lease certain real property to VCCH which was to construct a hotel thereon. The hotel was to be built immediately adjacent to a proposed expansion of the existing Visalia Convention Center which is operated by the City. (Appendix, pp. 6-7.)

On July 27, 1988, the City Council approved a "First Amended Agreement to Lease." Among the principal changes made in the First Amended Agreement to Lease was a provision

that the City, in order to assist VCCH in securing a construction loan from the Bank, would agree to contribute up to 2.9 million dollars toward VCCH's equity contribution required under the loan if VCCH could not provide all of its equity contribution. In the event that the City made such contributions toward VCCH's equity, VCCH would be obligated to reimburse such advances with interest through additional rental payments under the lease and, in addition, to pay to the City a percentage of the net operating income from the hotel. (*Id.*, pp. 7-8.)

At that same meeting, the City Council, sitting as the governing board of the Agency, approved an agreement with the Bank, providing for a guarantee of the partial repayment of the loan from Bank to VCCH for the construction of the Convention Center Hotel project ("Guarantee Agreement"). (*Id.*)

On July 3, 1989, Petitioner Kendall filed a complaint for declaratory relief, damages and injunction in the United States District Court, Eastern District of California naming as Defendants the City, the Agency and others. That complaint alleged the First Amended Agreement to Lease and the Guarantee

Agreement were in violation of California Constitution, Article XVI, paragraph 6, which prohibits gifts of public funds. The public entities and officials filed a motion to dismiss for lack of a federal question, and, immediately prior to the hearing on said motion, Petitioner Kendall voluntarily dismissed his federal action (Case No. CV-F-89-467 EDP). (*Id.*, p. 9; CT 133:14-15.)[1]

On September 5, 1989, Petitioner Kendall filed his initial complaint in this action. (Appendix, p. 9; CT 188:7-8.) Before service was made, he filed a first amended complaint. (Appendix, p. 9; CT 188:9.) In November, 1989, these Respondents filed a demurrer to the first amended complaint on the ground the challenge to the First Amended Agreement to Lease and the Guarantee Agreement was barred by the 60-day statute of limitations in California Code of Civil Procedure Section 863, and on December 4, 1989, the court sustained the demurrer with leave to amend. (Appendix, p. 10; CT 188:24-

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[1] CT refers to the Clerk's Transcript for the appeal in this action in the California appellate system. The number listed after "CT" is the page number. The numbers following the colon, if any, are line numbers.

26.) The court granted leave to amend if causes of action could be pled that were not barred by the 60-day statute of limitations and which did not turn on the validity of the First Amended Agreement to Lease and the Guarantee Agreement. (CT 237:24 - 238:13.)

Petitioner Kendall then retained Petitioner Hoar as his counsel and filed a second amended complaint. Notwithstanding the court's ruling that the validity of the First Amended Agreement to Lease and Guarantee Agreement could not be challenged, Petitioner Kendall realleged and even expanded his challenge to these agreements. On February 8, 1990, Respondents filed a demurrer and motion to strike the second amended complaint. (Appendix, p. 10; CT 190:1-2.) The demurrer was heard on February 28, 1990. The court concluded that the second amended complaint was confusing as far as theories and statement of the required facts to support those theories. (Appendix, p. 11; CT 498:24-26 and 499:1.) The court allowed Petitioners to further amend the complaint with the admonition that the court was *not* inclined to grant any leave to

amend the complaint further. (CT 499:2-7.) The court granted *60* days to again amend the complaint and "suggested" that Petitioner Hoar try to organize his theories and plead ultimate facts to support those theories. (Appendix, p. 11; CT 499:16-25.) The court repeated its prior ruling that causes of action which go to the validity of the First Amended Agreement to Lease and Guarantee were barred by the 60-day statute of limitations. (CT 500:17-26.)

The court subsequently extended Petitioners' time for filing a third amended complaint for an additional 30 days. (Appendix, p. 11; CT 190:9-12.) Petitioners filed a third amended complaint on May 30, 1990, which mushroomed to 123 pages, and 10 causes of action, and which again, despite the trial court's explicit prior rulings and directions to Petitioner Hoar, purported to challenge the validity of the First Amended Agreement to Lease and the Guarantee Agreement. (Appendix, p. 11.)

On July 13, 1990, these Respondents filed their demurrer and motion to strike said third amended complaint. On August

23, 1990, the demurrer and motion to strike were sustained, *without* leave to amend, as to all causes of action except the seventh cause; as to said cause of action (which appears to be an attempt to state a claim against Respondents under RICO), the demurrer was sustained with 90 days leave to amend. (Appendix, p. 11.) All causes of action challenging the First Amended Agreement to Lease and Guarantee Agreement were once again found to be barred by the 60-day statute of limitations. Numerous additional bases for the ruling were stated. (Appendix, pp. 51-60.) The court also granted Respondents' motion for imposition of sanctions against Petitioner Hoar, personally, in the amount of $7,500. (*Id.*) (CT 722:26 and 723:1-2.) The sanctions were based upon: (1) counsel failed to follow the prior directive of the court to organize legal theories and plead ultimate facts (CT 719:12-16); (2) counsel's including of improper and irrelevant materials in the complaint (CT 720:1-3); (3) counsel's actions in this matter appeared in many cases to have been done frivolously with bad faith and for the purpose of delay (CT 721:24-26); and (4) counsel failed to review his own cases that were cited to the

court and admitted that he took citations from a treatise (*California Jurisprudence*) without reading the cases themselves. (CT 722:2-7.)

Petitioners made numerous attempts to overturn this ruling while the case was still at the superior court level, including filing a motion for reconsideration (CT 523 and 524) and a motion to disqualify the judge. (CT 600 through 621.) Petitioners never filed a fourth amended complaint on the RICO cause of action. Ultimately, on Petitioners' own motion, the trial court entered a judgment of dismissal of the entire case. (CT 1049 and 1050.)

Petitioners' unsuccessful appeal ensued. On May 19, 1992, the Court of Appeal rejected all Petitioners' challenges and affirmed the judgment below. (Appendix, pp. 4-50.) Therein, the court explained in detail the justification for sustaining the demurrer without leave to amend as to each cause of action. (*Id.*, pp. 18-33.) It then set forth in detail the extensive basis for the sanctions against Petitioner Hoar. (*Id.*, pp. 34-50.)

Petitioners unsuccessfully sought review from the California Supreme Court. (*Id.*, p. 1.)

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SUMMARY OF ARGUMENT

Petitioners' first two issues presented--whether a plaintiff has the right under the First Amendment to file a lawsuit challenging governmental action and whether he or she has the right to be represented by counsel--are simply not issues arising from this action. If they were, they would not be disputed by Respondents.

The imposition of sanctions against Petitioner Hoar was justified in this case based upon his conduct, which included disobeying court orders and misrepresenting the holdings of cases. The imposition of sanctions did not violate Petitioners' First Amendment rights. The fact that governmental action is the subject of a lawsuit does not immunize litigants from the monetary consequences of unreasonable or frivolous litigation tactics.

Finally, Petitioners' challenge to the "methodology" used

by the trial court in reaching its decision is not properly at issue. Petitioners never asserted a federal issue on this point in the California court system. If they had, it would have failed since the application of the statute of limitations in this instance would have passed constitutional muster.

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ARGUMENT

I. PETITIONERS' FIRST TWO QUESTIONS PRESENTED ARE NOT AT ISSUE IN THIS ACTION.

As their first two "Questions Presented," Petitioners pose the following:

1. Do plaintiff and his attorney have the right under the First Amendment to petition the government of the City of Visalia for redress of grievances through the filing and prosecution of a lawsuit in order (a) to save Visalia Taxpayers' money, (b) to halt the illegal use and waste of taxpayers' general fund money and property to finance and support the construction of the privately owned Visalia Radisson Hotel, and (3) to recover misspent funds for the City Treasury?

2. Does a plaintiff who petitions the government for redress of grievances through the filing and prosecution of a lawsuit under the First Amendment have the right to have an attorney represent him in that lawsuit?

While these questions must obviously be answered in the affirmative, they are not issues before this Court. Petitioners certainly have taken full advantage of the judicial system as is their right under the First Amendment. Petitioner Kendall has never been deprived of representation by the counsel of his choice. There is certainly a clear distinction between having the *right* to petition for redress, and the denial of the redress sought based upon sound legal principles and well reasoned decisions of the courts. Having the right to petition does not guarantee the party the right to prevail.

II. THE IMPOSITION OF SANCTIONS UPON PETITIONER HOAR DOES NOT VIOLATE PETITIONERS' RIGHTS UNDER THE FIRST AMENDMENT.

The imposition of sanctions on counsel does not violate a party's right to petition the government for redress of grievances. In *Charles v. Daley*, 846 F.2d 1057 (7th Cir. 1988),

cert. denied, 492 U.S. 905, 109 S.Ct. 3214, 106 L.Ed.2d 564 (1989), *rehearing denied*, 492 U.S. 938, 110 S.Ct. 24, 106 L.Ed.2d 626 (1989), the court rejected the argument advanced here. It found that requiring private litigants to pay the plaintiffs over $200,000 did not violate the parties' rights under the First Amendment. It explained:

> While *Button* and *Primus* undeniably stand for the proposition that a right of access to the courts is guaranteed to those who seek to engage in litigation as a form of political expression, neither case suggests that such use of the judicial forum is entitled to be conducted free from both the inherent and statutorily imposed financial consequences of such activity.
>
> Litigation is not purely speech, it is more; litigation is conduct which can and does impose considerable costs on the parties as well as upon the federal judiciary. Where, as here,

> Congress has determined that a particular class of litigants, civil rights plaintiffs, is deserving of a fee-shifting scheme to make them whole after incurring substantial expenses in vindicating their constitutional rights, we refuse to hold such a scheme violative of the First Amendment simply because it forces those who choose voluntarily to interject themselves into such lawsuits to think twice before engaging in battle.

Id. at 1075, *citing NAACP v Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) and *In Re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978).

Federal courts have not hesitated to require private litigants to pay the attorneys' fees of successful public entity defendants in civil rights actions where their lawsuits were frivolous or unreasonable. *See, e.g., Raskiewicz v. Town of New Boston*, 754 F.2d 38 (1st Cir. 1985), *cert. denied*, 474 U.S. 845, 106 S.Ct. 135, 88 L.Ed.2d 111 (1985); *Munson v. Friske*, 754

F.2d 683 (7th Cir. 1985); *Goldrich, Kest & Stern v. City of San Fernando*, 617 F.Supp. 557 (C.D. Cal. 1985).

III. PETITIONERS DID NOT ASSERT ANY FEDERAL CHALLENGE TO CALIFORNIA'S VALIDATION ACT IN THE STATE COURT AND WOULD NOT HAVE PREVAILED IF THEY HAD.

As their final question presented, Petitioners appear to claim that the courts below have decided the case "on methodology" rather than on its merits, again depriving Petitioners of a First Amendment right. Presumably, Petitioners are referring to the application of California's "Validation Act" (Cal. Code Civ. Pro. §§ 860 *et seq.*), including the 60-day statute of limitations which barred their challenge to the First Amended Agreement to Lease and the Guarantee Agreement. Under California law, the First Amended Agreement to Lease and the Guarantee Agreement could only be challenged for 60 days. *Graydon v. Pasadena Redevelopment Agency*, 104 Cal.App.3d 631, 164 Cal.Rptr. 56 (1980), *cert. denied*, 449 U.S. 983, 101 S.Ct. 400, 66 L.Ed.2d 246 (1980); *Walter v. County of Plumas*, 61 Cal.App.3d 460, 132 Cal.Rptr. 174 (1976); Cal. Gov't Code § 53511; Cal. Code Civ. Pro. §§ 860, 863.

No federal challenge has previously been asserted by Petitioners regarding this "methodology." The *only* "federal" challenge raised by Petitioners in the California courts was limited to the imposition of sanctions against Petitioner Hoar. (Appendix, pp. 78-93.)

It is fundamental that since no federal questions were "drawn in question" regarding this methodology as required by 28 U.S.C. § 1257, this Court has no jurisdiction to address the issue at this juncture. *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969).

Even setting this failure aside, Petitioners simply have not identified how the reasonable procedural rulings of the California courts violated any First Amendment right.

The California Legislature adopted the validation procedures, including the 60-day statute of limitation, to provide a simple, uniform, *in rem* method for testing the validity of certain actions of public agencies regarding redevelopment. *Green v. Community Redevelopment Agency*, 96 Cal.App.3d 491, 500-501, 158 Cal.Rptr. 126 (1979); *Community Redevelopment*

Agency v. Superior Court, 248 Cal.App.2d 164, 169, 56 Cal.Rptr. 201 (1967).

The procedural aspects of the Validation Act--including the 60-day limitations period--are reasonable and therefore do not violate Petitioners' constitutional rights.

In *Littlewolf v. Hodel*, 681 F.Supp. 929 (D.D.C. 1988), *aff'd*, 877 F.2d 1058 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1043, 110 S.Ct. 837, 107 L.Ed.2d 832 (1990), the court upheld statute of limitations in the White Earth Reservation and Land Settlement Act of 1985, Pub. L. 99-264 § 2, 100 Stat. 61. The court noted the deference which is to be given to legislators in this regard: "The reasonableness of the time period is primarily judgment for the legislature, 'unless the time allowed is manifestly so insufficient that the statute become a denial of justice.'" (681 F.Supp. at 939, *quoting Wilson v. Iseminger*, 185 U.S. 55, 63, 22 S.Ct. 573, 575-576, 46 L.Ed. 804 (1902). *See also A. Soloff & Son, Inc. v. Asher*, 594 F.Supp. 724 (S.D. N.Y. 1984) (held, 60-day statute of limitation under the Multiemployer Pension Plan Amendments Act [29 U.S.C. § 1381 *et seq.*] upheld against

constitutional challenge); *Emberton v. City of San Diego*, 186 Cal.App.3d 268, 230 Cal.Rptr. 572 (1986), *cert. denied*, 481 U.S. 1038, 107 S.C. 1975, 95 L.Ed.2d 815 (1987).

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CONCLUSION

For all the foregoing reasons, Respondents submit that Petitioners have failed to establish any sound basis for this Court to review the holding below. The petition for writ of certiorari should therefore by denied.

Respectfully Submitted,

S. L. Kabot*
McCormick, Kabot, Michner & Foley
1220 West Main Street
Visalia, California 93291
(209) 734-6729

M. Katherine Jenson
Rutan & Tucker
611 Anton Boulevard, #1400
Costa Mesa, California 92626
P.O. Box 1950
Costa Mesa, California 92628
(714) 641-5100

*Counsel of Record

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